# THE GENERAL STATUTES OF NORTH CAROLINA

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## ANNOTATED

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## 1996 CUMULATIVE SUPPLEMENT

# Volume 11

## Chapters 59 through 74E

*Prepared under the Supervision of*

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

*Under the Direction of*

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Annotated through 470 S.E.2d 425. For complete scope of annotations, see scope of volume page.

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**Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.**

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# Preface

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This Cumulative Supplement to Volume 11 contains the general laws of a permanent nature enacted by the General Assembly through the 1996 Second Extra Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the new law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

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# User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

# Scope of Volume

**Statutes:**

Permanent portions of the General Laws enacted by the General Assembly through the 1996 Second Extra Session affecting Chapters 59 through 74E of the General Statutes.

**Annotations:**

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 343, p. 303.
North Carolina Court of Appeals Reports through Volume 121, p. 513.
South Eastern Reporter 2nd Series through Volume 470, p. 425.
Federal Reporter 3rd Series through Volume 83, p. 1423.
Federal Supplement through Volume 924, p. 224.
Federal Rules Decisions through Volume 165, p. 700.
Bankruptcy Reports through Volume 195, p. 823.
Supreme Court Reporter through Volume 116, p. 1711.
North Carolina Law Review through Volume 74, p. 1319.
Wake Forest Law Review through Volume 30, p. 1008.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

# The General Statutes of North Carolina
# 1996 Cumulative Supplement

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## VOLUME 11

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## Chapter 59.

## Partnership.

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## ARTICLE 2.

## *Uniform Partnership Act.*

## Part 1. Preliminary Provisions.

## § 59-31. Name of Article.

**Legal Periodicals.** — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

## § 59-32. Definition of terms.

In this Article:

(1) "Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent act.

(2) "Business" includes every trade, occupation, or profession.

(3) "Conveyance" includes every assignment, lease, mortgage, or encumbrance.
(4) "Court" includes every court and judge having jurisdiction in the case.
(5) "Person" includes individuals, partnerships, corporations, limited liability companies, and other associations.
(6) "Real property" includes land and any interest or estate in land.
(7) "Registered limited liability partnership" means a partnership that is registered under G.S. 59-84.2 and complies with G.S. 59-84.3. (1941, c. 374, s. 2; 1993, c. 354, s. 3.)

**Editor's Note.** — Session Laws 1993, c. 354, s. 29 is a severability clause.

## Part 2. Nature of a Partnership.

## § 59-36. Partnership defined.

### CASE NOTES

**There is no requirement for an express agreement, either written or oral, in order to form a partnership;** rather, a partnership may be created by the conduct and declarations of the principals without an express agreement of any kind. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Partnership Shown.** — A partnership existed between plaintiff and defendant, and plaintiff had a 50% interest in the partnership, where the evidence presented showed that plaintiff certainly contributed her property, effects, labor, and skill to the business. Wike v. Wike, 115 N.C. App. 139, 445 S.E.2d 406 (1994).

**Applied** in Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

**Quoted** in Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990); Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

**Cited** in Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

## § 59-37. Rules for determining the existence of a partnership.

### CASE NOTES

**Express Agreement Not Required.** —

Existence of a partnership does not require an express agreement and the parties' intent to formulate a partnership can be inferred by the conduct of the parties by examining all the circumstances. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

There is no requirement for an express agreement, either written or oral, in order to form a partnership; rather, a partnership may be created by the conduct and declarations of the principals without an express agreement of any kind. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**The intent to realize a profit is an indicia of partnership** without regard to whether the principals were successful in doing so. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Co-ownership and sharing of any actual profits** are indispensable requisites for a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

**Sharing Profits.** — Although sharing profits does not of itself establish a partnership, the Uniform Partnership Act emphasizes the importance of sharing profits in the existence of a partnership by mandating that the receipt by a person of a share of the business profits is prima facie evidence that he is a partner. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

**Filing of a certificate to transact business under an assumed name,** pursuant to § 66-68, does not manifest intent to form a partnership. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

**The filing of a partnership tax return, etc.** — In accord with the main volume. See Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

The filing of partnership tax returns is "significant" evidence of the existence of a partnership and may constitute an admission against interest by a party who denies the existence of a partnership after having signed a partnership return. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Applied** in Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

## § 59-38. Partnership property.

### CASE NOTES

**Determination of Partnership Property.** — An important factor in determining whether property listed in the names of the partners is partnership property is whether the property is used by those partners for partnership purposes; if so, such use of the property is evidence of an intention that the property be partnership property. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Where a partnership is formed and operated around a single asset for a period of years,** courts should be reluctant to permit the partners to separate that asset from the partnership, particularly after the occurrence of a transaction or event giving rise to a legal controversy and particularly on the basis of after-the-fact testimony regarding their subjective intentions. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Partnership Property Shown.** — Where partners acquired 15.98 acre tract of land as the first step in carrying out business venture which they had associated together to own and operate and the only reason the property was deeded to them was so that they could pursue the business venture which they were pursuing as partners, the property thereby was brought into the partnership and was "partnership property" under the definition contained in subparagraph (a). Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Joint Venture.** — The principle in subsection (a) holds true for property bought on account of a joint venture. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

**Liability Insurance — Property of Joint Venture.** — Where church purchased liability insurance pursuant to a joint venture agreement and on account of voluntary association between it and not-for-profit organization with which it ran a day care program, the insurance was purchased on account of the joint venture and was therefore an asset of the joint venture. Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865 (1993), petition allowed as to additional issues, 334 N.C. 163, 432 S.E.2d 361, aff'd in part, discretionary review improvidently granted in part, 336 N.C. 581, 444 S.E.2d 203 (1994).

**Stated** in Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

## Part 3. Relations of Partners to Persons Dealing with the Partnership.

## § 59-39. Partner agent of partnership as to partnership business.

**Legal Periodicals.** — For comment, "Creating the legal monster: the expansion and effect of legal malpractice liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

### CASE NOTES

**Authority of Partner to Bind Firm.** —

Although partner did not sign documents in the partnership name, and the partnership did not ratify his actions, sufficient evidence was presented that he was acting on behalf of the partnership and had the authority to do so. Mountain Farm Credit Serv. v. Purina Mills, Inc., 119 N.C. App. 508, 459 S.E.2d 75 (1995).

**Burden of Proof Where Partner Did Not Sign in Name of Partnership.** — Where one partner did not sign either a promissory note or mortgage in the name of the alleged partnership, the plaintiff had the burden of showing either that (1) that partner was acting on behalf of the partnership when he executed the note and mortgage and the other partner had authorized his acts, or (2) the other partner, with knowledge of the note and mortgage, ratified his acts. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

**Materialman's Lien Held Superior to Deed of Trust.** — Since deed of trust which was recorded did not convey debtor's predecessor's interest in that property, but instead purported to convey the interest of which was an interest which debtor did not have, since the deed was indexed with debtor as grantor and thus was recorded outside of its chain of title and had the same effect on notice as no registration, and since the fact that such deed was signed general partner of actual owner had no effect, materialman's lien was superior to deed of trust. Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989), aff'd per curiam, 907 F.2d 1139 (4th Cir. 1990).

## § 59-40. Conveyance of real property of the partnership.

### CASE NOTES

**How Title to Real Property Held.** — Under this Article, title to real property owned by a partnership may be held either in the partnership name or in the name of some or all of the partners. Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982); Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Determination of Partnership Property.** — An important factor in determining whether property listed in the names of the partners is partnership property is whether the property is used by those partners for partnership purposes; if so, such use of the property is evidence of an intention that the property be partnership property. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Stated** in Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

## § 59-42. Partnership charged with knowledge of or notice to partner.

**Legal Periodicals.** —

For comment, "Creating the legal monster: the expansion and effect of legal malpractice liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

## § 59-43. Partnership bound by partner's wrongful act.

**Legal Periodicals.** — For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

For comment, "Creating the legal monster: the expansion and effect of legal malpractice liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

### CASE NOTES

**Quoted** in Heath v. Craighill, Rendleman, Ingle & Blythe, 97 N.C. App. 236, 388 S.E.2d 178 (1990).

## § 59-45. Nature of partner's liability in ordinary partnerships and in registered limited liability partnerships.

(a) Except as provided by subsection (b) of this section, all partners are jointly and severally liable for the acts and obligations of the partnership.

(b) A partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business by another partner or representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence, or malfeasance occurred, unless the first partner was directly involved in the specific activity in which the errors, omissions, negligence, incompetence, or malfeasance were committed by the other partner or representative.

(c) Subsection (b) of this section does not affect any of the following:

(1) The joint and several liability of a partner for debts and obligations of the partnership arising from any cause other than those specified in subsection (b) of this section.

(2) The joint and several liability of a partner for any taxes owed by the partnership under Chapter 105 of the General Statutes or Article 3 of Chapter 119 of the General Statutes.

(3) The liability of partnership assets for partnership debts and obligations. (1941, c. 374, s. 15; 1953, c. 881; 1993, c. 354, s. 4.)

**Editor's Note.** — Session Laws 1993, c. 354, s. 29 is a severability clause.

**Legal Periodicals.** — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

For comment, "Creating the legal monster: the expansion and effect of legal malpractice liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

### CASE NOTES

**Notice Held Sufficient.** — Where defendants, who were general partners, were sued individually, and the prayer for relief asked for enforcement of arbitration award against all defendants jointly and severally, the individual defendants were on notice that plaintiff's complaint sought to hold them individually liable for any award made in the arbitration; with that knowledge, defendants filed an answer requesting that the action be stayed pending determination of the claims in the arbitration proceeding; therefore, defendants were on notice that the arbitration proceeding would affect them individually, and not only as partners, even though the defendants were not named individually in the arbitration proceeding. George W. Kane, Inc. v. Bolin Creek West Assocs., 95 N.C. App. 135, 381 S.E.2d 832 (1989).

**Burden of Proof Where Partner Did Not Sign in Name of Partnership.** — Where one partner did not sign either a promissory note or mortgage in the name of the alleged partnership, the plaintiff had the burden of showing either that (1) that partner was acting on behalf of the partnership when he executed the note and mortgage and the other partner had authorized his acts, or (2) the other partner, with knowledge of the note and mortgage, ratified his acts. Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991).

**General Partner Not Held Personally Liable.** — General partner who was not made a party to the defendant's counterclaim or served with a copy of a summons, could not be held personally liable for the judgment against the partnership. Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

**Applied** in NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

**Quoted** in Hinshaw v. Wright, 105 N.C. App. 158, 412 S.E.2d 138 (1992).

## § 59-46. Partner by estoppel.

**Legal Periodicals.** — For comment, "Creating the legal monster: the expansion and effect of legal malpractice liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

### CASE NOTES

**The filing of partnership tax returns is "significant" evidence of the existence of a partnership** and may constitute an admission against interest by a party who denies the existence of a partnership after having signed a partnership return. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

## Part 4. Relations of Partners to One Another.

## § 59-48. Rules determining rights and duties of partners.

### CASE NOTES

**Where insurance proceeds were joint venture property of church and day care** and were sufficient to cover plaintiffs' claims arising from accident with church van, the church was not entitled to indemnity or contribution as the church incurred no "personal liabilities" and made no "personal payments"; rather, the joint venture incurred the liabilities and the insurance maintained for its protection covered the settlement payment. Jones v. Shoji, 336 N.C. 581, 444 S.E.2d 203 (1994).

**Cited** in Jones v. Shoji, 110 N.C. App. 48, 428 S.E.2d 865 (1993).

## § 59-51. Partner accountable as a fiduciary.

### CASE NOTES

**Applicability.** — Although this section does not extend a partner's fiduciary duty to actions connected with the formation of the partnership, it expressly applies to "every partner." There is no indication that it applies beyond this context to individuals who agree to but never actually form a partnership. Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

**Cited** in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

## § 59-52. Right to an account.

### CASE NOTES

**Applied** in Silverman v. Miller, 155 Bankr. 362 (Bankr. E.D.N.C. 1993).

**Cited** in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

# Part 5. Property Rights of a Partner.

## § 59-54. Extent of property rights of a partner.

### CASE NOTES

**Deed of trust executed by debtor did not create a security interest** in the partnership interest of debtor in partnership property; the trustee, was entitled to avoid such deed of trust to the extent that the deed of trust was alleged to create a security interest in the partnership interest of debtor. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

## § 59-55. Nature of a partner's right in specific partnership property.

### CASE NOTES

**Partners Protected by § 45-21.36.** — Each partner, though certainly not enjoying the traditional rights of owners, holds a property interest sufficient to invoke the protection of § 45-21.36. If it were otherwise, mortgagees could avoid the requirements of § 45-21.36 when foreclosing on property owned by a partnership simply by suing the partners for a deficiency. NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

**The extent to which a partner may transfer or assign his interest in specific partnership property is controlled and limited by subparagraph (2);** the effect of this provision is to invalidate or render void an assignment by a partner of his interest in specific partnership property if such assignment is not joined in by the other partners. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

**Personal Policy Did Not Cover Partnership Property.** — Cargo van involved in accident was not general partner's property for purposes of coverage under his personal blanket excess policy; because the cargo van was owned, maintained, and used by partnership on behalf of partnership business, the exception to the business pursuits exclusion did not apply and no coverage was provided by the policy. Harleysville Mut.

Ins. Co. v. Packer, 60 F.3d 1116 (4th Cir. 1995).

## § 59-56. Nature of partner's interest in the partnership.

### CASE NOTES

**Partner's Interest Not Subject to Statute of Frauds.** — A partner's interest in partnership assets — including real property — is a personal property interest. As such, it is not subject to the statute of frauds. Potter v. Homestead Preservation Ass'n, 330 N.C. 569, 412 S.E.2d 1 (1992).

**Deed of Trust Did Not Create a Security Interest.** — Where financing statements were not filed in either the office of the Secretary of State or the office of the Register of Deeds in the county of the debtor's place of business, with the result that no security interest in debtor's partnership interest was perfected prior to the commencement of his Chapter 7 case, even if the deed of trust had been intended to create a security interest in debtor's partnership interest, it would be avoidable by the trustee and ineffective. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

## § 59-57. Assignment of partner's interest.

### CASE NOTES

**Deed of trust executed by debtor did not create a security interest in the partnership interest of debtor in partnership property;** the trustee, was entitled to avoid such deed of trust to the extent that the deed of trust was alleged to create a security interest in the partnership interest of debtor. Magers v. Thomas (In re Vannoy), 176 Bankr. 758 (Bankr. M.D.N.C. 1994).

## Part 6. Dissolution and Winding Up.

## § 59-59. Dissolution defined.

### CASE NOTES

**Cited** in Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

## § 59-60. Partnership not terminated by dissolution.

### CASE NOTES

**Cited** in Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

## § 59-61. Causes of dissolution.

### CASE NOTES

**Applied** in Cole v. Graves, 101 N.C. App. 396, 399 S.E.2d 136 (1991).

## § 59-62. Dissolution by decree of court.

### CASE NOTES

**Cited** in Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

## § 59-66. Effect of dissolution on partner's existing liability.

### CASE NOTES

**Cited** in Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

## § 59-71. Liability of persons continuing the business in certain cases.

### CASE NOTES

**Where company did not promise to pay** the creditors of a dissolved partnership, it was not liable under subsection (d) of this section. Pendergrass v. Card Care, Inc., 333 N.C. 233, 424 S.E.2d 391 (1993).

## ARTICLE 3.

## *Surviving Partners.*

## § 59-84. Settlement otherwise provided for.

### CASE NOTES

**Quoted** in Cole v. Graves, 101 N.C. App. 396, 399 S.E.2d 136 (1991).

## ARTICLE 3A.

## *Miscellaneous Provisions.*

## § 59-84.1. Partnership to comply with "assumed name" statute.

**Editor's Note.** — Session Laws 1993, c. 354, s. 5, effective October 1, 1993, placed existing 59-84.1 in new Article 3A as the first section thereof.

Session Laws 1993, c. 354, s. 29 is a severability clause.

## § 59-84.2. Registered limited liability partnerships.

(a) To become a registered limited liability partnership, a partnership must file with the Secretary of State an application stating the name of the partnership, the address of its principal office, the number of partners, and a brief statement of the business in which the partnership engages. A registration as a registered limited liability partnership must be renewed annually.

(b) An application for registration as a registered limited liability partnership must be executed by a majority in interest of the partners or by one or more partners authorized by a majority in interest of the partners.

(c) An application for registration as a registered limited liability partnership or for renewal of a registration must be accompanied by a fee of one hundred dollars ($100.00).

(d) The Secretary of State shall register or renew the registration of a partnership that submits a completed application with the required fee.

(e) A registration is effective for one year after the date the registration is filed, unless it is voluntarily withdrawn before then by filing with the Secretary of State a written withdrawal notice executed by a majority in interest of the partners or by one or more partners authorized by a majority in interest of the partners.

(f) The Secretary of State may provide forms for applications for registration or renewal of a registration. (1993, c. 354, s. 5.)

**Editor's Note.** — Session Laws 1993, c. 354, s. 30 made this section effective October 1, 1993.

**Legal Periodicals.** — For comment, "How the Uniform Partnership Act Determines Ultimate Liability for a Claim Against a General Partnership and Provides for the Settling of Accounts Between Partners," see 17 Campbell L. Rev. 333 (1995).

For comment, "Creating the legal monster: the expansion and effect of legal malpractice liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

## § 59-84.3. Name of registered limited liability partnerships.

A registered limited liability partnership's name must contain the words "registered limited liability partnership" or the abbreviation "L.L.P." as the last words or letters of its name. (1993, c. 354, s. 5.)

**Editor's Note.** — Session Laws 1993, c. 354, s. 30 made this section effective October 1, 1993.

## ARTICLE 5.

## *Revised Uniform Limited Partnership Act.*

### Part 1. General Provisions.

## § 59-101. Short title.

**Legal Periodicals.** — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

## § 59-103. Name.

(a) The name of the limited partnership shall contain without abbreviation the words "limited partnership";

(b) The limited partnership name shall not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner, or (ii) the business of the limited partnership has been carried on under that name before the admission of that limited partner;

(c) The limited partnership name shall not contain any word or phrase which is likely to mislead the public or which indicates or implies that it is organized for any purpose other than one or more of the purposes contained in its certificate of limited partnership;

(d) The limited partnership name shall be distinguishable upon the records of the Secretary of State from:

(1) The name of a corporation, nonprofit corporation, limited partnership, or limited liability company organized in this State, or a foreign corporation or nonprofit corporation, foreign limited partnership, or foreign limited liability company authorized to transact business in this State;

(2) A name reserved under G.S. 55-4-02, 55-4-03, 55A-4-02, 55A-4-03, 57C-2-31, 57C-2-32, 59-104, or 59-904; and

(3) The fictitious name adopted by a foreign corporation or nonprofit corporation, foreign limited partnership, or foreign limited liability company authorized to transact business in this State because its real name is unavailable. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 1; 1995, c. 539, s. 34.)

**Effect of Amendments.** — The 1995 amendment, applicable to names filed, reserved, or registered on or after July 29, 1995, rewrote subsection (d).

## Part 2. Formation; Certificate of Limited Partnership.

## § 59-204. Execution of certificates.

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

(1) An original certificate of limited partnership must be signed by all general partners;

(2) A certificate of amendment must be signed by at least one general partner and by each other partner designated in the certificate as a new general partner; and

(3) A certificate of cancellation must be signed by all general partners.

(b) Any person may sign a certificate by an attorney-in-fact.

(c) The execution of a certificate or amendment by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 153, s. 1.)

## § 59-206. Filing requirements.

(a) Whenever the provisions of this Article require any document relating to a limited partnership to be executed and filed in accordance with this Article, unless otherwise specifically stated in this Article:

(1) There shall be an original executed document and also one conformed copy.

(2) The original document so signed, together with the conformed copy, shall be delivered to the Secretary of State. Unless the Secretary finds that it does not conform to law, the Secretary shall, when the proper fees have been tendered, endorse upon the original the word "filed" and the hour, day, month and year of the filing thereof and shall file the same in the Secretary's office. The Secretary of State shall thereupon immediately compare the copy with the original and if the Secretary finds that they are identical the Secretary shall make upon the conformed copy the same endorsement which appears on the original and shall attach to the copy a certificate stating that attached thereto is a true copy of the document, designated by an appropriate title, filed in the Secretary's office and showing the date of the filing. The Secretary shall thereupon return the copy so certified to the limited partnership or its representatives. Any documents filed with the Secretary of State pursuant to this Chapter may be maintained by the Secretary either in their original form or in photographic, microfilm, optical disk media, or other reproduced form. The Secretary may make reproductions of documents filed under this Chapter, or under any predecessor act, by photographic, microfilm, optical disk media, or other means of reproduction, and may destroy the originals of the documents reproduced. The Secretary of State may correct apparent errors and omissions on a document submitted for filing if authorized to make the corrections by the person submitting the document for filing. The authorization to make the corrections shall be confirmed, according to procedures adopted by rule, by the Secretary prior to making the correction.

(3) Repealed by Session Laws 1991, c. 153, s. 2.

(3a) Whenever the name of any domestic or foreign limited partnership holding title to real property in this State is changed upon amendment to the certificate of limited partnership, a certificate reciting the change or transfer shall be recorded in the office of the register of deeds of the county where the property lies, or if the property is located in more than one county, then in each county where any portion of the property lies.

(4) The Secretary of State shall adopt uniform certificates to be furnished for registration in accordance with this section. In the case of a foreign limited partnership, a similar certificate by any competent authority of the jurisdiction under which the limited partnership is organized may be registered in accordance with this section.

(5) The certificate required by this section shall be recorded by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by any other officer shall be required. The former name of the limited partnership holding title to the real property before the amendment shall appear in the "Grantor" index, and the amended name of the limited partnership holding title to the real property by virtue of the amendment shall appear in the "Grantee" index.

(b) Repealed by Session Laws 1991, c. 153, s. 2.

(b1) Except as provided in subsection (b2), a document accepted for filing is effective:

(1) At the time of filing on the date it is filed, as evidenced by the Secretary of State's date and time endorsement on the original document; or

(2) At the time specified in the document as its effective time on the date it is filed.

(b2) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but not time is specified, the document is effective at 11:59:59 p.m. on that date. A delayed effective date for a document may not be later than the ninetieth day after the date it is filed.

(b3) The fact that a document has become effective under this section does not determine its validity or invalidity or the correctness or incorrectness of the information contained in the document.

(c) It shall be the duty of the Secretary of State, whenever so requested and upon tender of the proper fees, to certify as aforesaid any true copy of any document on file in the office, or if requested, to make or cause to be made typewritten or photostatic copies of the documents and to certify the same as aforesaid. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1987, c. 531, s. 5; 1991, c. 153, s. 2; 1995, c. 539, s. 35.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, added the last four sentences in subdivision (a)(2), made the section gender neutral, and made stylistic changes.

## § 59-206.1. Evidentiary effect of copy of filed document.

A photographic, microfilm, optical disk media, or other reproduced copy of a document filed pursuant to this Chapter or any predecessor act, when certified by the Secretary, shall be considered an original for all purposes and is admissible in evidence in like manner as an original. (1995, c. 539, s. 36.)

**Editor's Note.** — Session Laws 1995, c. 539, s. 38(a), made this section effective October 1, 1995.

## Part 3. Limited Partners.

## § 59-303. Liability to third parties.

### CASE NOTES

**Cited** in Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

## Part 4. General Partners.

### § 59-403. General powers and liabilities.

**Legal Periodicals.** — For note, "Corporate Law — Limited Liability Company Act, N.C. Gen. Stat. §§ 57C-1-01 to 57C-10-07 (1993)," see 72 N.C.L. Rev. 1654 (1994).

## Part 11. Miscellaneous.

### § 59-1106. Fees.

The Secretary of State shall collect the following fees and remit them to the State Treasurer for the use of the State:

| | |
|---|---|
| (1) For filing a certificate of limited partnership (G.S. 59-201) | $50.00 |
| (2) For filing a certificate of amendment (G.S. 59-202; 59-905) | 25.00 |
| (3) For filing a certificate of cancellation (G.S. 59-203; 59-906) | 25.00 |
| (4) For filing an application for reservation of name (G.S. 59-104(a)) | 10.00 |
| (5) For filing a transfer of name (G.S. 59-104(d)) | 10.00 |
| (6) For filing an application for registration as foreign limited partnership (G.S. 59-502) | 50.00 |
| (7) For preparing and furnishing a copy of any document, instrument or paper filed or recorded relating to a limited partnership (G.S. 59-206(c)) | |
| For each page | 1.00 |
| For affixing his certificate and official seal thereto | 5.00 |
| (8) For comparing a copy furnished to him of any document, instrument or paper filed or recorded relating to a limited partnership | |
| For each page | 1.00 |
| (9) For filing any other document not herein specifically provided for | 10.00 |
| (10) For the expedited filing by the end of the same business day of a document received in good order by 12:00 noon Eastern Standard Time | 200.00 additional fee |
| (11) For the expedited filing of a document received in good order within 24 hours after receipt, excluding weekends and holidays | 100.00 additional fee |

The Secretary of State shall not collect the fees allowed in subdivisions (10) and (11) of this section unless the person submitting the document for filing requests and expedited filing and is informed by the Secretary of State of the fees prior to the filing of the document. Upon receipt of a document in proper form and payment of the required filing fee, the Secretary of State shall guarantee the expedited filing of the document. (1985 (Reg. Sess., 1986), c. 989, s. 2; 1991, c. 574, s. 3; 1995, c. 539, s. 37.)

**Effect of Amendments.** — The 1995 amendment, applicable to expedited filings submitted on or after July 29, 1995, added subdivisions (10) and (11), added the last paragraph, and made a related change.

# Chapter 62.
# Public Utilities.

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## ARTICLE 1.

## *General Provisions.*

## § 62-2. Declaration of policy.

Upon investigation, it has been determined that the rates, services and operations of public utilities as defined herein, are affected with the public interest and that the availability of an adequate and reliable supply of electric power and natural gas to the people, economy and government of North Carolina is a matter of public policy. It is hereby declared to be the policy of the State of North Carolina:

(1) To provide fair regulation of public utilities in the interest of the public;

(2) To promote the inherent advantage of regulated public utilities;

(3) To promote adequate, reliable and economical utility service to all of the citizens and residents of the State;

(3a) To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills;

(4) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy;

(4a) To assure that facilities necessary to meet future growth can be financed by the utilities operating in this State on terms which are reasonable and fair to both the customers and existing investors of such utilities; and to that end to authorize fixing of rates in such a manner as to result in lower costs of new facilities and lower rates over the operating lives of such new facilities by making provisions in the rate-making process for the investment of public utilities in plants under construction;

(5) To encourage and promote harmony between public utilities, their users and the environment;

(6) To foster the continued service of public utilities on a well-planned and coordinated basis that is consistent with the level of energy needed for the protection of public health and safety and for the promotion of the general welfare as expressed in the State energy policy;

(7) To seek to adjust the rate of growth of regulated energy supply facilities serving the State to the policy requirements of statewide development;

(8) To cooperate with other states and with the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply; and

(9) To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of an expansion fund for each natural gas local distribution company to be administered under the supervision of the North Carolina Utilities Commission.

To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in this Chapter. Nothing in this Chapter shall be construed to imply any extension of Utilities Commission regulatory jurisdiction over any industry or enterprise that is not subject to the regulatory jurisdiction of said Commission.

Because of technological changes in the equipment and facilities now available and needed to provide telephone and telecommunications services, changes in regulatory policies by the federal government, and changes resulting from the court-ordered divestiture of the American Telephone and Telegraph Company, competitive offerings of certain types of telephone and telecommunications services may be in the public interest. Consequently, authority shall be vested in the North Carolina Utilities Commission to allow competitive offerings of local exchange, exchange access, and long distance services by public utilities defined in G.S. 62-3(23)a.6. and certified in accordance with the provisions of G.S. 62-110, and the Commission is further authorized after notice to affected parties and hearing to deregulate or to exempt from regulation under any or all provisions of this Chapter: (i) a service provided by any public utility as defined in G.S. 62-3(23)a.6. upon a finding that such service is competitive and that such deregulation or exemption from regulation is in the public interest; or (ii) a public utility as defined in G.S. 62-3(23)a.6., or a portion of the business of such public utility, upon a finding that the service or business of such public utility is competitive and that such deregulation or exemption from regulation is in the public interest.

The policy and authority stated in this section shall be applicable to common carriers of passengers by motor vehicle and their regulation by the North Carolina Utilities Commission only to the extent that they are consistent with the provisions of the Bus Regulatory Reform Act of 1985.

The North Carolina Utilities Commission may develop regulatory policies to govern the provision of telecommunications services to the public which promote efficiency, technological innovation, economic growth, and permit telecommunications utilities a reasonable opportunity to compete in an emerging competitive environment, giving due regard to consumers, stockholders, and maintenance of reasonably affordable local exchange service and long distance service. (1963, c. 1165, s. 1; 1975, c. 877, s. 2; 1977, c. 691, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 1; 1985, c. 676, s. 3; 1987, c. 354; 1989, c. 112, s. 1; 1991, c. 598, s. 1; 1995, c. 27, s. 1; 1995 (Reg. Sess., 1996), c. 742, ss. 29-32.)

**Editor's Note.** —

See Editor's note under 62-133.5 regarding Session Laws 1995, c. 27, s. 6.1.

**Effect of Amendments.** — The 1995 amendment, effective July 1, 1995, in the third paragraph from the end, in the second sentence inserted "local exchange, exchange access, and" preceding "long distance" and at the end of the second sentence added the language beginning "and the Commission is further authorized" through the end of the paragraph.

Session Laws 1995 (Reg. Sess., 1996), c. 742, ss. 29 through 32, effective June 21, 1996, substituted "plants" for "plant" in subdivision (4a); deleted "and" from the end of subdivision (7); added "and" to the end of subdivision (8); and made punctuation changes.

## CASE NOTES

**Delegation of Authority to Commission Constitutional.** — The standard of public convenience and necessity and the policies of the State were sufficient to guide the North Carolina Utilities Commission in deciding a certificate of public convenience and necessity case, and the legislature's delegation of this authority to the Commission was not unconstitutional. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

The expansion fund legislation is a proper delegation of legislative authority to an administrative agency and is not unconstitutional. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments, specifically subdivision (9) of this section or § 62-158. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure** rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

**This section does not confer an exclusive emolument or privilege** by creating a private benefit only for those residents of unserved areas in violation of N.C. Const., Art. I, § 32. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**The capture of supplier refunds for the purpose of funding the expansion fund** does not constitute a taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the "law of the land" clause of N.C. Const., Art. I, § 19. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Quoted** in State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

**Cited** in State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

## § 62-3. Definitions.

As used in this Chapter, unless the context otherwise requires, the term:

(1) "Broker," with regard to motor carriers of passengers, means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which as principal or agent engages in the business of selling or offering for sale any transportation of passengers by motor carrier, or negotiates for or holds himself, or itself, out by solicitation, advertisements, or otherwise, as one who sells, provides, furnishes, contracts, or arranges for such transportation for compensation, either directly or indirectly.

(1a) "Bus company" means any common carrier by motor vehicle which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of passengers over fixed routes or in charter operations, or both, except as exempted in G.S. 62-260.

(2) "Certificate" means a certificate of public convenience and necessity issued by the Commission to a public utility or a certificate of authority issued by the Commission to a bus company.

(3) "Certified mail" means such mail only when a return receipt is requested.

(4) "Charter operations" with regard to bus companies means the transportation of a group of persons for sightseeing purposes, pleasure tours, and other types of special operations, or the transportation of a group of persons who, pursuant to a common purpose and under a single contract, and for a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartered group after having left the place of origin.

(5) "Commission" means the North Carolina Utilities Commission.

(6) "Common carrier" means any person which holds itself out to the general public to engage in transportation of persons or household goods for compensation, including transportation by train, bus, truck, boat or other conveyance, except as exempted in G.S. 62-260.

(7) "Common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce of persons or household goods or any class or classes thereof for compensation, whether over regular or irregular routes, or in charter operations, except as exempted in G.S. 62-260.

(7a) "Competing local provider" means any person applying for a certificate to provide local exchange or exchange access services in competition with a local exchange company.

(8), (9) Repealed by Session Laws 1995, c. 523, s. 1, effective July 29, 1995.

(9a) "Fixed route" means the specific highway or highways over which a bus company is authorized to operate between fixed termini.

(10) "Foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country.

(11) "Franchise" means the grant of authority by the Commission to any person to engage in business as a public utility, whether or not exclusive or shared with others or restricted as to terms and conditions and whether described by area or territory or not, and includes certificates, and all other forms of licenses or orders and decisions granting such authority.

(12) "Highway" means any road or street in this State used by the public or dedicated or appropriated to public use.

(13) "Industrial plant" means any plant, mill, or factory engaged in the business of manufacturing.

(14) "Interstate commerce" means commerce between any place in a state and any place in another state or between places in the same state through another state.

(15) "Intrastate commerce" means commerce between points and over a route or within a territory wholly within this State, which commerce is not a part of a prior or subsequent movement to or from points outside of this State in inter-

state or foreign commerce, and includes all transportation within this State for compensation in interstate or foreign commerce which has been exempted by Congress from federal regulation.

(16) "Intrastate operations" means the transportation of persons or household goods for compensation in intrastate commerce.

(16a) "Local exchange company" means a person holding, on January 1, 1995, a certificate to provide local exchange services or exchange access services.

(17) "Motor carrier" means a common carrier by motor vehicle.

(18) "Motor vehicle" means any vehicle, machine, tractor, semitrailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.

(19) "Municipality" means any incorporated community, whether designated in its charter as a city, town, or village.

(20) Repealed by Session Laws 1995, c. 523, s. 1, effective July 29, 1995.

(21) "Person" means a corporation, individual, copartnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof.

(22) "Private carrier" means any person not included in the definitions of common carrier, which transports in intrastate commerce in its own vehicle or vehicles property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or when such transportation is purely an incidental adjunct to some other established private business owned and operated by such person other than the transportation of household goods for compensation.

(23)a. "Public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation;
2. Diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation, or operating a public sewerage system for compensation; provided, however, that the term "public utility" shall not include any person or company whose sole operation consists of selling water to less than 10 residential customers, except that any person or company which con-

structs a water system in a subdivision with plans for 10 or more lots and which holds itself out by contracts or other means at the time of said construction to serve an area containing more than 10 residential building lots shall be a public utility at the time of such planning or holding out to serve such 10 or more building lots, without regard to the number of actual customers connected;

3. Transporting persons or household goods by street, suburban or interurban bus or railways for the public for compensation;
4. Transporting persons or household goods by railways or motor vehicles, or any other form of transportation for the public for compensation, except motor carriers exempted in G.S. 62-260, and except carriers by air;
5. Transporting or conveying gas, crude oil or other fluid substance by pipeline for the public for compensation;
6. Conveying or transmitting messages or communications by telephone or telegraph, or any other means of transmission, where such service is offered to the public for compensation.

b. The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

c. The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

d. The term "public utility," except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, electric or telephone membership corporation or nonprofit water membership or consumer-owned corporations financed by the Farmers Home Administration, the United States Department of Housing and Urban Development, or any similar or successor federal financing agency, provided, that (i) any such financing administration, department or agency exercise substantial control over and regulation of any such corporation's rates and terms and conditions of service, and (ii) the members or consumer-owners of any such corporation, pursuant to the corporation's articles of incorporation and bylaws, shall elect the governing board of the corporation; or any person not otherwise a public utility who furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge. If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter. A water or sewer system owned by a homeowners' association that provides water or sewer service only to members or leaseholds of members is not subject to the provisions of this Chapter.

e. The term "public utility" shall include the University of North Carolina insofar as said University supplies telephone service, electricity or water to the public for compensation from the University Enterprises defined in G.S. 116-41.1(9).

f. The term "public utility" shall include the Town of Pineville insofar as said town supplies telephone services to the public for compensation. The territory to be served by the Town of Pineville in furnishing telephone services, subject to the Public Utilities Act, shall include the town limits as they exist on May 8, 1973, and shall also include the area proposed to be annexed under the town's ordinance adopted May 3, 1971, until January 1, 1975.

g. The term "public utility" shall not include a hotel, motel, time share or condominium complex operated primarily to serve transient occupants, which imposes charges to occupants for local, long-distance, or wide area telecommunication services when such calls are completed through the use of facilities provided by a public utility, and provided further that the local services received are rated in accordance with the provisions of G.S. 62-110(d) and the applicable charges for telephone calls are prominently displayed in each area where occupant rooms are located.

h. The term "public utility" shall not include the resale of electricity by (i) a campground operated primarily to serve transient occupants, or (ii) a marina; provided that (i) the campground or marina charges no more than the actual cost of the electricity supplied to it, (ii) the amount of electricity used by each campsite or marina slip occupant is measured by an individual metering device, (iii) the applicable rates are prominently displayed at or near each campsite or marina slip, and (iv) the campground or marina only resells electricity to campsite or marina slip occupants.

i. The term "public utility" shall not include the State, the Office of the State Controller, or the Microelectronics Center of North Carolina in the provision or sharing of switched broadband telecommunications services with non-State entities or organizations of the kind or type set forth in G.S. 143B-426.39.

j. The term "public utility" shall not include any person, not otherwise a public utility, conveying or transmitting messages or communications by mobile radio communications service. Mobile radio communications service includes one-way or two-way radio service provided to mobile or fixed stations or receivers using mobile radio service frequencies.

(24) "Rate" means every compensation, charge, fare, tariff, schedule, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service product or commodity offered by it to the public, and any rules, regulations, practices or contracts affecting any such compensation, charge, fare, tariff, schedule, toll, rental or classification.

(25) "Route" means the course or way which is traveled; the road or highway over which motor vehicles operate.

(26) "Securities" means stock, stock certificates, bonds, notes, debentures, or other evidences of ownership or of indebtedness, and any assumption or guaranty thereof.

(27) "Service" means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.

(27a) "Small power producer" means a person or corporation owning or operating an electrical power production facility with a power production capacity which, together with any other facilities located at the same site, does not exceed 80 megawatts of electricity and which depends upon renewable resources for its primary source of energy. For the purposes of this section, renewable resources shall mean: hydroelectric power. A small power producer shall not include persons primarily engaged in the generation or sale of electricity from other than small power production facilities.

(28) The word "State" means the State of North Carolina; "state" means any state.

(29) "Town" means any unincorporated community or collection of people having a geographical name by which it may be generally known and is so generally designated.

(30) "Panel" means a panel of three commissioners, a division of the Utilities Commission authorized for the purpose of carrying out certain functions of the Commission. (1913, c. 127, s. 7; C.S., s. 1112(b); 1933, c. 134, ss. 3, 8; c. 307, s. 1; 1937, c. 108, s. 2; 1941, cc. 59, 97; 1947, c. 1008, s. 3; 1949, c. 1132, s. 4; 1953, c. 1140, s. 1; 1957, c. 1152, s. 13; 1959, c. 639, ss. 12, 13; 1963, c. 1165, s. 1; 1967, c. 1094, ss. 1, 2; 1971, c. 553; c. 634, s. 1; cc. 894, 895; 1973, c. 372, s. 1; 1975, c. 243, s. 2; cc. 254, 415; 1979, c. 652, s. 1; 1979, 2nd Sess., c. 1219, s. 1; 1981 (Reg. Sess., 1982), c. 1186, s. 2; 1985, c. 676, s. 4; 1987, c. 445, s. 2; 1989, c. 110; 1993, c. 349, s. 1; 1993 (Reg. Sess., 1994), c. 777, s. 1(b); 1995, c. 27, ss. 2, 3; c. 509, s. 34; c. 523, s. 1.)

**Editor's Note.** — Chapter 55, referred to in subdivision (23)c of this section, was rewritten, effective July 1, 1990. For definitions applicable to that chapter, see now § 55-1-40.

**Effect of Amendments.** — Session

Laws 1995, c. 27, ss. 2 and 3, effective July 1, 1995, added subdivisions (7a) and (16a).

Session Laws 1995, c. 509, s. 34, effective July 29, 1995, substituted a semicolon for the colon at the end of subdivision (23)a.1.

Session Laws 1995, c. 523, s. 1, effective July 29, 1995, in subdivisions (6), (7), (16), (22), (23)a.3., and (23)a.4. substituted "household goods" for "property"; deleted subdivision (8) which defined "Contract carrier by motor vehicle"; deleted subdivision (9) which defined "Contract carrier" and made related changes in subdivisions (11), (17) and (22); in subdivision (11) deleted "and permits" following "certificates"; deleted subdivision (20) which defined "Permit"; deleted "or express service" following "transportation" in subdivision (23)a.4.; and added subdivision (23)j.

### CASE NOTES

**In determining the scope of the Commission's authority,** the emphasis should be placed on the public utility function rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude commission's jurisdiction over a function which is required to provide adequate service to the subscribers. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**As to what constitutes a contract carrier, etc. —**

A company which offers white-water rafting excursions is not a common carrier, because any "transportation" was merely incidental to primary purpose of outdoor adventure, camaraderie, excitement and thrills. Beavers v. Federal Ins. Co., 113 N.C. App. 254, 437 S.E.2d 881, cert. denied, 336 N.C. 602, 447 S.E.2d 384 (1994).

**Cited** in In re Lower Cape Fear Water & Sewer Auth., 329 N.C. 675, 407 S.E.2d 155 (1991); State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

### OPINIONS OF ATTORNEY GENERAL

**The Department of Correction, as a State agency, is not a public utility** and is not subject to the fee requirements of § 62-302. See Opinion of Attorney General to LaVee Hamer, General Counsel, North Carolina Department of Correction, — N.C.A.G. — (October 17, 1994).

## ARTICLE 2.

## *Organization of Utilities Commission.*

### § 62-10. Number; appointment; terms; qualifications; chairman; vacancies; compensation; other employment prohibited.

(a) The North Carolina Utilities Commission shall consist of seven commissioners who shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before May 1, of the year in which the terms for which the appointments are to be made are to expire. Upon failure of the Governor to submit names as herein provided, the Lieutenant Governor and Speaker of the House jointly shall submit the names of a like number of commissioners to the General Assembly on or before May 15 of the same year for confirmation by the General Assembly. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to adjournment of the then current session of the General Assembly. This subsection shall be subject to the provisions of subsection (c) of this section.

(b) The terms of the commissioners now serving shall expire at the conclusion of the term for which they were appointed which shall remain as before with two regular eight-year terms expiring on July 1 of each fourth year after July 1, 1965, and the fifth term expiring on July 1 of each eighth year after July 1, 1963. The terms of office of utilities commissioners thereafter shall be eight years commencing on July 1 of the year in which the predecessor terms expired, and ending on July 1 of the eighth year thereafter.

(c) In order to increase the number of commissioners to seven, the names of two additional commissioners shall be submitted to the General Assembly on or before May 27, 1975, for confirmation by the General Assembly as provided in G.S. 62-10(a). The commissioners so appointed and confirmed shall serve new terms commencing on July 1, 1975, one of which shall be for a period of two years (with the immediate successor serving for a period of six years), and one of which shall be for a period of two years.

Thereafter, the terms of office of the additional commissioners shall be for eight years as provided in G.S. 62-10(b).

(d) A commissioner in office shall continue to serve until his successor is duly confirmed and qualified but such holdover shall not affect the expiration date of such succeeding term.

(e) On July 1, 1965, and every four years thereafter, one of the commissioners shall be designated by the Governor to serve as chairman of the Commission for the succeeding four years and until his successor is duly confirmed and qualifies. Upon death or resignation of the commissioner appointed as chairman, the Governor shall designate the chairman from the remaining commissioners and appoint a successor as hereinafter provided to fill the vacancy on the Commission.

(f) In case of death, incapacity, resignation or vacancy for any other reason in the office of any commissioner prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor within four weeks after the vacancy arises to the General Assembly for confirmation by the General Assembly. Upon failure of the Governor to submit the name of the successor, the Lieutenant Governor and Speaker of the House jointly shall submit the name of a successor to the General Assembly within six weeks after the vacancy arises. Regardless of the way in which names of commissioners are submitted, confirmation of commissioners must be accomplished prior to the adjournment of the then current session of the General Assembly.

(g) If a vacancy arises or exists pursuant to either subsection (a) or (c) or (f) of this section when the General Assembly is not in session, and the appointment is deemed urgent by the Governor, the commissioner may be appointed and serve on an interim basis pending confirmation by the General Assembly.

(h) The salary of each commissioner shall be the same as that fixed from time to time for judges of the superior court except that the commissioner designated as the chairman shall receive one thousand dollars ($1,000) additional per annum. In lieu of merit and other increment raises paid to regular State employees, each commissioner, including the commissioner designated as chairman, shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, and nine and six-tenths percent (9.6%) after 10 years of service. "Service" means service as a member of the Utilities Commission.

(i) The standards of judicial conduct provided for judges in Article 30 Chapter 7A of the General Statutes shall apply to members of the Commission. Members of the Commission shall be liable to impeachment for the causes and in the manner provided for judges of the General Court of Justice in Chapter 123 of the General Statutes. Members of the Commission shall not engage in any other employment, business, profession, or vocation while in office.

(j) Members of the Commission shall be reimbursed for travel and subsistence expenses at the rates allowed to State officers and employees by G.S. 138-6(a). (1941, c. 97, s. 2; 1949, c. 1009, s. 1; 1959, c. 1319; 1963, c. 1165, s. 1; 1967, c. 1238; 1975, c. 243, s. 3; c. 867, ss. 1, 2; 1977, c. 468, s. 1; c. 913, s. 2; 1983 (Reg. Sess., 1984), c. 1116, s. 91; 1989, c. 781, s. 41.2; 1993 (Reg. Sess., 1994), c. 769, s. 7.4(b); 1996, 2nd Ex. Sess., c. 18, s. 28.2(b).)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Session Laws 1995, c. 358, s. 2, as amended by Session Laws 1995, c. 437, s. 1, and by Session Laws 1995, c. 467, s. 1, provides that the salaries established by Session Laws 1993, c. 769, s. 7.4, shall remain until July 28, 1995, at the level set by or under that section as of June 30, 1995; and that no State employee or officer may prior to July 28, 1995, receive a merit increase or annual increment.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

**Effect of Amendments.** — The 1996 Second Extra Session amendment, effective September 1, 1996, substituted "shall be the same as that fixed from time to time for judges of the superior court except that the commissioner designated as the chairman shall receive one thousand dollars ($1,000) additional per annum" for "and that of the commissioner designated as chairman shall be set by the General Assembly in the Current Operations Appropriations Act" in subsection (h).

## § 62-15. Office of executive director; public staff, structure and function.

(a) There is established in the Commission the office of executive director, whose salary shall be the same as that fixed for members of the Commission. The executive director shall be appointed by the Governor subject to confirmation by the General Assembly by joint resolution. The name of the executive director appointed by the Governor shall be submitted to the General Assembly on or before May 1 of the year in which the term of his office begins. The term of office for the executive director shall be six years, and the initial term shall begin July 1, 1977. The executive director may be removed from office by the Governor in the event of his incapacity to serve; and the executive director shall be removed from office by the Governor upon the affirmative recommendation of a majority of the Commission, after consultation with the Joint Legislative Utility Review Committee of the General Assembly. In case of a vacancy in the office of executive director for any reason prior to the expiration of his term of office, the name of his successor shall be submitted by the Governor to the General Assembly, not later than four weeks after the vacancy arises. If a vacancy arises in the office when the General Assembly is not in session, the executive director shall be appointed by the Governor to serve on an interim basis pending confirmation by the General Assembly.

(b) There is established in the Commission a public staff. The public staff shall consist of the executive director and such other professional, administrative, technical, and clerical personnel as may be necessary in order for the public staff to represent the using and consuming public, as hereinafter provided. All such personnel shall be appointed, supervised, and directed by the executive director. The public staff shall not be subject to the supervision, direction, or control of the Commission, the chairman, or members of the Commission.

(c) Except for the executive director, the salaries and compensation of all such personnel shall be fixed in the manner provided by law for fixing and regulating salaries and compensation by other State agencies.

(d) It shall be the duty and responsibility of the public staff to

(1) Review, investigate, and make appropriate recommendations to the Commission with respect to the reasonableness of rates charged or proposed to be charged by any public utility and with respect to the consistency of such rates with the public policy of assuring an energy supply adequate to protect the public health and safety and to promote the general welfare;

(2) Review, investigate, and make appropriate recommendations to the Commission with respect to the service furnished, or proposed to be furnished by any public utility;

(3) Intervene on behalf of the using and consuming public, in all Commission proceedings affecting the rates or service of any public utility;

(4) When deemed necessary by the executive director in the interest of the using and consuming public, petition the Commission to initiate proceedings to review, investigate, and take appropriate action with respect to the rates or service of public utilities;

(5) Intervene on behalf of the using and consuming public in all certificate applications filed pursuant to the provisions of G.S. 62-110.1, and provide assistance to the Commission in making the analysis and plans required pursuant to the provisions of G.S. 62-110.1 and 62-155;

(6) Intervene on behalf of the using and consuming public in all proceedings wherein any public utility proposes to reduce or abandon service to the public;

(7) Investigate complaints affecting the using and consuming public generally which are directed to the Commission, members of the Commission, or the public staff and where appropriate make recommendations to the Commission with respect to such complaints;

(8) Make studies and recommendations to the Commission with respect to standards, regulations, practices, or service of any public utility pursuant to the provisions of G.S. 62-43; provided, however, that the public staff shall have no

duty, responsibility, or authority with respect to the enforcement of natural gas pipeline safety laws, rules, or regulations;

(9) When deemed necessary by the executive director, in the interest of the using and consuming public, intervene in Commission proceedings with respect to transfers of franchises, mergers, consolidations, and combinations of public utilities pursuant to the provisions of G.S. 62-111;

(10) Investigate and make appropriate recommendations to the Commission with respect to applications for certificates by radio common carriers, pursuant to the provisions of Article 6A of this Chapter;

(11) Review, investigate, and make appropriate recommendations to the Commission with respect to contracts of public utilities with affiliates or subsidiaries, pursuant to the provisions of G.S. 62-153;

(12) When deemed necessary by the executive director, in the interest of the using and consuming public, advise the Commission with respect to securities, regulations, and transactions, pursuant to the provisions of Article 8 of this Chapter.

(e) The public staff shall have no duty, responsibility, or authority with respect to the laws, rules or regulations pertaining to the physical facilities or equipment of common, contract and exempt carriers, the registration of vehicles or of insurance coverage of vehicles of common, contract and exempt carriers; the licensing, training, or qualifications of drivers or other persons employed by common, contract and exempt carriers, or the operation of motor vehicle equipment by common, contract and exempt carriers in the State.

(f) The executive director representing the public staff shall have the same rights of appeal from Commission orders or decisions as other parties to Commission proceedings.

(g) Upon request, the executive director shall employ the resources of the public staff to furnish to the Commission, its members, or the Attorney General, such information and reports or conduct such investigations and provide such other assistance as may reasonably be required in order to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation.

(h) The executive director is authorized to employ, subject to approval by the State Budget Officer, expert witnesses and such other professional expertise as the executive director may deem necessary from time to time to assist the public staff in its participation in Commission proceedings, and the compensation and expenses therefor shall be paid by the utility or utilities participating in said proceedings. Such compensation and expenses shall be treated by the Commission, for rate-making purposes, in a manner generally consistent with its treatment of similar expenditures incurred by utilities in the presentation of their cases before the Commission. An accounting of such compensation and expenses shall be reported annually to the Joint Legislative Utility Review Committee and to the Speaker of the House of Representatives and the President Pro Tempore of the Senate.

(i) The executive director, within established budgetary limits, and as allowed by law, shall authorize and approve travel, subsistence, and related necessary expenses of the executive director or members of the public staff, incurred while traveling on official business. (1949, c. 1009, s. 3; 1963, c. 1165, s. 1; 1977, c. 468, s. 4; 1981, c. 475; 1983, c. 717, s. 12.1; 1985, c. 499, s. 4; 1989, c. 781, s. 41.3; 1989 (Reg. Sess., 1990), c. 1024, s. 13.)

## § 62-23. Commission as an administrative board or agency.

### CASE NOTES

**Benefits of 1986 Tax Reform Act to Ratepayers Through Rule Making Procedure.** — The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

## ARTICLE 3.

## *Powers and Duties of Utilities Commission.*

## § 62-30. General powers of Commission.

### CASE NOTES

**Benefits of 1986 Tax Reform Act to Ratepayers Through Rule Making Procedure.** — The Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

**Incorrect Telephone Number Listings.** — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Proper Listings in Advertisements in Yellow Pages.** — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

## § 62-31. Power to make and enforce rules and regulations for public utilities.

### CASE NOTES

**Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure.** — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rule making procedure rather than a rate making procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

**Cited** in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

## § 62-36A. Natural gas planning.

(a) The Commission shall require each franchised natural gas local distribution company to file reports with the Commission detailing its plans for providing natural gas service in areas of its franchise territory in which natural gas service is not available. Commission rules shall require that each local distribution company shall update its report at least every two years.

(b) The Commission shall develop rules to carry out the intent of subsection (a) of this section, and to produce an orderly system for reviewing current levels of natural gas service and planning the orderly expansion of natural gas service to areas not served. These rules shall provide for expansion of service by each franchised natural gas local distribution company to all areas of its franchise territory by July 1, 1998 or within three years of the time the franchise territory is awarded, whichever is later, and shall provide that any local distribution company that the Commission determines is not providing adequate service to at least some portion of each county within its franchise territory by July 1, 1998 or within three years of the time the franchise territory is awarded, whichever is later, shall forfeit its exclusive franchise rights to that portion of its territory not being served.

(b1) The Commission shall issue a certificate of public convenience and necessity in accordance with the provisions of Article 6 of this Chapter for natural gas service for all areas of the State for which certificates have not been issued. Issuance of certificates shall be completed by January 1, 1997, and shall be made after a hearing process in which any person capable of providing natural gas service to an area of the State for which no certificate has been issued or for which no application has been made by July 1, 1995, may apply to the Commission to be considered for the issuance of a certificate under the provisions of this subsection. In issuing a certificate for any unfranchised area of the State, the Commission shall consider the timeliness with which each applicant could begin providing adequate, reliable, and economical service to that area, as well as any other criteria the Commission finds to be relevant, and the Commission may issue a certificate covering less than the total area applied for by an applicant. If the Commission issues a certificate covering less than the total area applied for by the applicant, the applicant may refuse the certificate. In the event that the Commission receives no application for issuance of a certificate for service to a particular area of the State, or in the event a certificate for service to a particular area is not awarded for any reason, the Commission shall issue a certificate for that area to a person or persons to whom a certificate has already been issued.

(c) Within 180 days after all local distribution companies have filed their initial or biennial update reports, the Commission and the Public Staff shall independently provide analyses and summaries of those reports, together with status reports of natural gas service in the State, to the Joint Legislative Utility Review Committee. (1989,

c. 338, s. 1; 1993 (Reg. Sess., 1994), c. 560, s. 1; 1995, c. 216, s. 1; c. 271, s. 1.)

**Cross References.** — As to current provisions relating to natural gas expansion, see § 62-158. As to current provisions relating to gas cost adjustment for natural gas local distribution companies, see § 62-133.4.

**Effect of Amendments.** — Session Laws 1995, c. 216, s. 1, effective July 1, 1995, added subsection (b1).

Session Laws 1995, c. 271, s. 1, effective June 15, 1995, added the second sentence in subsection (b).

### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

## § 62-36B. Regulation of natural gas service agreements.

Whenever the Commission, after notice and hearing, finds that additional natural gas service agreements (including "backhaul" agreements) with interstate or intrastate pipelines will provide increased competition in North Carolina's natural gas industry and (i) will likely result in lower costs to consumers without substantially increasing the risks of service interruptions to customers, or (ii) will substantially reduce the risks of service interruptions without unduly increasing costs to consumers, the Commission may enter and serve an order directing the franchised natural gas local distribution company to negotiate in good faith to enter into such service agreements within a reasonable time. In considering costs to consumers under this section, the Commission may consider both short-term and long-term costs. (1989 (Reg. Sess., 1990), c. 962, s. 5.)

**Editor's Note.** — Session Laws 1989 (Reg. Sess., 1990), c. 962, s. 6 made this section effective upon ratification. The act was ratified July 18, 1990.

## § 62-41. To investigate accidents involving public utilities; to promote general safety program.

The Commission may conduct a program of accident prevention and public safety covering all public utilities with special emphasis on highway safety and transport safety and may investigate the causes of any accident on a highway involving a public utility. Any information obtained upon such investigation shall be reduced to writing and a report thereof filed in the office of the Commission, which shall be subject to public inspection but such report shall not be admissible in evidence in any civil or criminal proceeding arising from such accident. The Commission may adopt reasonable rules and regulations for the safety of the public as affected by public utilities and the safety of public utility employees. The Commission shall cooperate with and coordinate its activities for public utilities with similar programs of the Division of Motor Vehicles, the Insurance Department, the Industrial Commission and other organizations engaged in the promotion of highway safety and employee safety. (1899, c. 164, s. 24; Rev., s. 1065; C.S., s. 1061; 1933, c. 134,

s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1975, c. 716, s. 5; 1995 (Reg. Sess., 1996), c. 673, s. 2.)

**Effect of Amendments.** — The 1995 (Reg. Sess., 1996) amendment, effective July 1, 1996, in the first sentence, deleted "railroad or" following "any accident on a", and deleted "public utility, or any accident in connection with any other" following "highway involving a".

## § 62-42. Compelling efficient service, extensions of services and facilities, additions and improvements.

### CASE NOTES

**Proposed Siting of Electrical Transmission Line.** — North Carolina Utilities Commission had jurisdiction to hear and resolve dispute arising from the proposed siting of an electrical transmission line against electric membership corporations. State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992), aff'd per curiam, 334 N.C. 681, 435 S.E.2d 71 (1993). Decided prior to effective date of § 62-100, et seq.

**Providing a correct telephone listing** is part of providing "reasonably adequate service" as required by subdivision (a)(5) of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

Providing a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Incorrect Telephone Number Listings.** — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Proper Listings in Advertisements in Yellow Pages.** — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Quoted** in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

## § 62-50. Safety standards for gas pipeline facilities.

(a) The Commission may promulgate and adopt safety standards for the operation of natural gas pipeline facilities in North Carolina. These safety standards shall apply to the pipeline facilities of gas utilities and pipeline carriers under franchise from the Utilities Commission and to pipeline facilities of other gas operators, as defined in subsection (g) of this section. The Commission shall require that all gas operators file with the Commission reports of all accidents occurring in connection with the operation of their gas pipeline facilities located in North Carolina. The Commission may require that all gas operators file with the Commission copies of their construction, operation, and maintenance standards and procedures, and any amendments thereto, and such other information as may be necessary to show compliance with the safety standards promulgated by the Commission. Where the Commission has reason to believe that any gas operator is not in compliance with the Commission's safety standards, the Commission may, after notice and hearing, order that gas operator to take such measures as may be necessary to comply with the standards. The Commission may require all gas operators to furnish engineering reports showing that their pipeline facilities are in safe operating condition and are being operated in conformity with the Commission's safety standards.

(b) The Commission is hereby authorized to enter into agreements with the United States Department of Transportation and other federal agencies and with other states or public utilities commissions of other states for the regulation of natural gas pipelines located within the State of North Carolina and upon the execution of such cooperative agreements, the Commission is authorized to utilize Commission personnel for inspection, investigation, and regulation of safety standards for interstate and intrastate natural gas pipelines in North Carolina, and to share in the cost of such regulation with other agencies having duties with respect to the regulation of said natural gas pipelines, and to receive funds from the United States Department of Transportation for such regulation. The Commission may use Commission personnel to inspect and investigate all gas incidents, facilities, and records kept pursuant to the provisions of 49 Code of Federal Regulations, Parts 191, 192, and 193, and to cooperate with other state and federal agencies in determining the probable cause or causes of gas incidents. Any information obtained during an investigation of a gas incident shall be reduced to writing and a report containing that information shall be filed with the Chief Clerk of the Commission and the report shall be subject to public inspection but the report shall not be admissible in evidence in any civil or criminal proceeding arising from the incident.

(c) The Utilities Commission is hereby authorized to enter into cooperative agreements for inspection of all natural gas pipelines of North Carolina to the end that the Utilities Commission may enter into agreements with the United States Department of Transportation or other federal or state agencies to regulate and inspect the safety standards for all natural gas pipelines in the State of North Carolina, including interstate natural gas pipelines.

(d) Any person who violates any provision of this section, or any regulation of the Utilities Commission issued thereunder, shall be subject to a civil penalty for each violation for each day that the violation continues. The maximum penalty for each day of a violation and for all the days of a continuing violation may not exceed the maximum penalties that would apply if the penalties had been imposed under 49 U.S.C. Appx. § 1679a(a) by the Secretary of the United States Department of Transportation. Penalties assessed under this subsection shall be credited to the General Fund as nontax revenue.

(e) Any action for civil penalty or any claim for said penalty may be compromised by the Utilities Commission and settled for an agreed amount. In determining the amount of the penalty imposed in civil action, or the amount agreed upon in compromise, the amount of the penalty shall be considered in relation to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after any prior notification of a violation. The amount of the penalty, when finally determined in a civil action, or the amount agreed upon in compromise, may be deducted from any sums owing by the State to the person charged, or may be collected as in the case of any judgment in a civil action in the State courts.

(f) The General Court of Justice of North Carolina is authorized to issue court orders, restraining orders, injunctions and other processes of the court in actions by the Utilities Commission to enforce the provisions of this Chapter relating to gas pipeline safety, and the Commission is authorized to bring actions in said court, including actions for mandatory injunctions, restraining orders, temporary restraining orders, penalties, damages and such other relief as may be necessary to secure compliance with the provisions of this section and regulations of the Commission duly enacted and adopted hereunder relating to gas pipeline safety. This provision is in addition to other powers of the Commission and the courts in relation to the enforcement of provisions of this Chapter in the courts, and shall not limit the present powers of the Commission in bringing actions in the courts for enforcement of other provisions of this Chapter.

(g) For the purpose of this section, "gas operators" include gas utilities and gas pipeline carriers operating under a franchise from the Utilities Commission, municipal corporations operating municipally owned gas distribution systems, and public housing authorities and any person operating apartment complexes or mobile home parks that distribute or submeter natural gas to their tenants. This section does not confer any other jurisdiction over municipally owned gas distribution systems, public housing authorities or persons operating apartment complexes or mobile home parks. (1967, c. 1134, s. 1; 1969, c. 646; 1971, cc. 549, 1145; 1979, c. 269, s. 1; 1989, c. 481, ss. 1, 2; 1993, c. 189, s. 1.)

## ARTICLE 4.

## *Procedure before the Commission.*

### § 62-60. Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

#### CASE NOTES

**This section does not give the Commission the authority to determine the constitutionality of the legislation.** State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Cited** in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

## § 62-62. Issuance and service of subpoenas.

All subpoenas for witnesses to appear before the Commission, a division of the Commission or a hearing commissioner or examiner and notice to persons or corporations, shall be issued by the Commission or its chief clerk or a deputy clerk and be directed to any sheriff or other officer authorized by law to serve process issued out of the superior courts, who shall execute the same and make due return thereof as directed therein, under the penalties prescribed by law for a failure to execute and return the process of any court. The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding. (1949, c. 989, s. 1; 1963, c. 1165, s. 1; 1995, c. 379, s. 14(c).)

**Effect of Amendments.** — The 1995 amendment, effective July 6, 1995, but not affecting pending litigation, deleted "constable" following "sheriff" in the first sentence.

## § 62-65. Rules of evidence; judicial notice.

### CASE NOTES

**Evidence Held Sufficient.** — The Commission heard ample evidence to support its finding that the introduction of natural gas facilities into unserved areas would assist in the economic development of those areas. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Quoted** in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 337 N.C. 236, 446 S.E.2d 348 (1994).

## § 62-70. Ex parte communications.

### CASE NOTES

**Applied** in State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990).

## § 62-73. Complaints against public utilities.

### CASE NOTES

**In determining the scope of the Commission's authority,** the emphasis should be placed on the public utility function rather than a literal reading of the statutory definition of "public utility," and the statutory definition should not be read so narrowly as to preclude commission jurisdiction over a function which is required to provide adequate service to the subscribers. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Providing a correct telephone listing** in the yellow pages as well as in the white pages of the directory is a utility function, and the Commission properly has jurisdiction over complaints which arise from this function. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Incorrect Telephone Number Listings.** — The Utilities Commission had jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory even when the regulated utility had delegated to another company the public utility function of publishing its directory which also included paid advertising. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Proper Listings in Advertisements in Yellow Pages.** — If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's "function of providing adequate service" to the public. The public is not well served by listings in the yellow pages or the white pages of the directory which are incorrect or confusing to the consuming public. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 326 N.C. 522, 391 S.E.2d 487 (1990).

**Quoted** in State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

## § 62-78. Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure.

### CASE NOTES

**Improper Appeal.** — To allow an appeal from a recommended order to which no exception has been taken and which has become the final order of the full Commission by operation of the statute would allow a party, in effect, to "bypass" the full Commission, usurping the administrative agency's authority. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

## § 62-79. Final orders and decisions; findings; service; compliance.

### CASE NOTES

**Commission Need Not Comment on Every Fact Presented.** — This section does not require that an order of the Commission contain a summary of the appellant's argument if the order taken as a whole is sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and contains the necessary findings of fact and conclusions of law. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Quoted** in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 337 N.C. 236, 446 S.E.2d 348 (1994).

## § 62-80. Powers of Commission to rescind, alter or amend prior order or decision.

### CASE NOTES

**Applied** in State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

## § 62-81. Special procedure in hearing and deciding rate cases.

### CASE NOTES

**Applied** in State ex rel. Utils. Comm'n v. Thornburg, 324 N.C. 478, 380 S.E.2d 112 (1989).

## § 62-82. Special procedure on application for certificate for generating facility; appeal from award order.

### CASE NOTES

**Scope of Commission's Authority and Jurisdiction.** — North Carolina Utilities Commission's dismissal of petitioner independent power producer's application and its establishment of minimum filing requirements did not constitute an impermissible deviation from the process specifically provided in this section and § 62-110.1, and some deviation from these sections was not beyond the Commission's authority and jurisdiction. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

## Article 5.

## *Review and Enforcement of Orders.*

## § 62-90. Right of appeal; filing of exceptions.

### CASE NOTES

I. In General.

#### I. IN GENERAL.

**Who May Appeal.** —

In order to have standing to appeal under this section, a party must not only file notice of appeal within 30 days, but must also be aggrieved. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 104 N.C. App. 216, 408 S.E.2d 876 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

**Utility customers association was not an aggrieved party** entitled to appeal an order of the Utilities Commission adopting a rate making formula which authorized a natural gas company to adjust its rates when it purchased gas from nontraditional sources. Contention that association was an aggrieved party because the order would allow gas company to increase its rates in the future to the extent necessary to offset previous reductions under the order was without merit. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 104 N.C. App. 216, 408 S.E.2d 876 (1991), cert. denied, 330 N.C. 618, 412 S.E.2d 95 (1992).

**Applied** in State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 111 N.C. App. 251, 431 S.E.2d 880 (1993); State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

**Cited** in State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 218, 415 S.E.2d 758 (1992).

# § 62-94. Record on appeal; extent of review.

## CASE NOTES

I. In General.
II. Standard of Review.
III. Limitations on Review.
  A. In General.
  B. Weighing of Evidence.
IV. Prima Facie Just and Reasonable.
  A. In General.
  B. Rates.
  C. Findings.
  D. Determinations.
  E. Orders.
V. Cases Decided Prior to 1949 Revision of Procedural Sections.

### I. IN GENERAL.

***Editor's Note.*** *— The annotations that were previously carried under this section in the main volume and the 1990 Cumulative Supplement, along with annotations taken since the publication thereof, have been edited and reprinted below so as to accommodate new analysis lines.*

**The Utilities Commission is a creature of the legislature** and may exercise jurisdiction and regulatory authority only as defined by Chapter 62. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 93 N.C. App. 260, 377 S.E.2d 772 (1989), rev'd on other grounds, 326 N.C. 522, 391 S.E.2d 487 (1990).

**Discretion of Utilities Commission.** — In deciding complaints, the Utilities Commission is allowed discretion in fashioning a remedy; the Commission could transfer service of one cooperative to electric utility rather than all complainants, as long as its action was not capricious or arbitrary. Dennis v. Duke Power Co., 341 N.C. 91, 459 S.E.2d 707 (1995).

**Subsection (b) States Authority of Court.** — The authority of the court to which an appeal is taken from an order of the Utilities Commission is stated in subsection (b) of this section. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

Subsection (b) gives the Supreme Court ample basis for ordering refunds to ratepayers who have been charged unlawfully high rates. Therefore, the Supreme Court is authorized to order refunds when the Commission has made an error of law in its rate making procedures. State ex rel. Utils. Comm'n v. Conservation Council, 312 N.C. 59, 320 S.E.2d 679 (1984).

**Questions on appeal from the Commission must be determined from the record certified by it.** State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

The Commission has the duty to enter final orders that are sufficient in detail to enable the Supreme Court on appeal to determine the controverted issues. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

**Unless Facts Are in Record, Commission's Expert Knowledge Cannot Be Considered.** — The Commission's knowledge, however expert, cannot be considered by the Supreme Court on appeal unless the facts embraced within that knowledge are in the record. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

**Attorney General Not Prejudiced by Failure to Hold Hearing.** — The Attorney General was not prejudiced by the action of the Commission in allowing an exploration tracking rate increase to go into effect without a hearing, since a refund could be sought under this section. State ex rel. Utils. Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

**Contents of Order Remanding Cause.** — If a cause is remanded under this section, the order should specify the ground on which it is based and thereby indicate to the Commission the nature of its further proceedings. State ex rel. Utils. Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960).

**Doctrine of Res Judicata.** — Where

an administrative determination has been reviewed by the courts, the res judicata effect, if any, attaches to the court's judgment rather than to the administrative decision. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

**Applied** in State ex rel. Utils. Comm'n v. Haywood Elec. Membership Corp., 260 N.C. 59, 131 S.E.2d 865 (1963); State ex rel. N.C. Utils. Comm'n v. Southern Ry., 267 N.C. 317, 148 S.E.2d 210 (1966); State ex rel. Utils. Comm'n v. Associated Petro. Carriers, 13 N.C. App. 554, 186 S.E.2d 612 (1972); State ex rel. Utils. Comm'n v. Edmisten, 291 N.C. 575, 232 S.E.2d 177 (1977); In re Duke Power Co., 37 N.C. App. 138, 245 S.E.2d 787 (1978); State ex rel. Utils. Comm'n v. Boren Clay Prods. Co., 48 N.C. App. 263, 269 S.E.2d 234 (1980); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 309 N.C. 195, 306 S.E.2d 435 (1983); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 323 N.C. 481, 374 S.E.2d 361 (1988); State ex rel. Utils. Comm'n v. North Carolina Natural Gas Corp., 323 N.C. 630, 375 S.E.2d 147 (1989); State ex rel. Utils. Comm'n v. Thornburg, 324 N.C. 478, 380 S.E.2d 112 (1989); State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989); State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

**Quoted** in State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 61 N.C. App. 42, 300 S.E.2d 395 (1983); State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 338 S.E.2d 888 (1986); State ex rel. Utils. Comm'n v. Thornburg, 84 N.C. App. 482, 353 S.E.2d 413 (1987).

**Stated** in State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 268 N.C. 242, 150 S.E.2d 386 (1966); State ex rel. Utils. Comm'n v. North Carolina Cellular Ass'n, 111 N.C. App. 801, 433 S.E.2d 785 (1993).

**Cited** in State ex rel. Utils. Comm'n v. Two Way Radio Serv., Inc., 272 N.C. 591, 158 S.E.2d 855 (1968); State ex rel. Utils. Comm'n v. Public Serv. Co., 35 N.C. App. 156, 241 S.E.2d 79 (1978); In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979); State ex rel. Utils. Comm'n v. Central Tel. Co., 60 N.C. App. 493, 299 S.E.2d 264 (1983); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 307 N.C. 541, 299 S.E.2d 763 (1983); State ex rel. Utils. Comm'n v. Conservation Council, 64 N.C. App. 266, 307 S.E.2d 375 (1983); State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 314 N.C. 171, 333 S.E.2d 259 (1985); Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990); State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991); State ex rel. Utilities Comm'n v. Centel Cellular Co., 103 N.C. App. 731, 407 S.E.2d 257 (1991); State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

## II. STANDARD OF REVIEW.

**Standard that governs appellate review of Commission orders is statutorily articulated by subsections (b) and (c)** of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

**Commission's Decision Will Be Upheld Unless Assailable Under Subsection (b).** — The decision of the Commission with regard to rates for public utilities will be upheld by the Court of Appeals on appeal unless it is assailable on one of the grounds enumerated in subsection (b) of this section. State ex rel. Utils. Comm'n v. Mebane Home Tel. Co., 35 N.C. App. 588, 242 S.E.2d 165 (1978), aff'd, 298 N.C. 162, 257 S.E.2d 623 (1979).

Judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria of this section which circumscribe judicial review. State ex rel. Utils. Comm'n v. Bird Oil Co., 302 N.C. 14, 273 S.E.2d 232 (1981).

A decision of the Utilities Commission will be upheld on appeal unless the appellate court finds error based on one of the enumerated grounds of this section. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

**Absence of proper findings is an error of law** and basis for remand under subdivision (b)(4) of this section because it frustrates appellate review. State ex rel. Utils. Comm'n v. Conservation Council, 66 N.C. App. 456, 311 S.E.2d 617, rev'd in part, 312 N.C. 59, 320 S.E.2d 679 (1984); State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

**Scope of Review.** — Grounds for relief not specifically set forth in the notice of appeal filed with the Commission may not be relied upon in the appellate courts; however, even when specific grounds are set forth, the applicable scope of review may be determined only from an examination of the issues brought forward by the appealing party and the nature of the supporting contentions. Dennis v Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994), modified, 341 N.C. 91, 459 S.E.2d 707 (1995).

**The failure to include all the necessary findings of fact is an error of law and a basis for remand** under subdivision (b)(4) of this section, because it frustrates appellate review. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

The Commission's order must be sufficient within itself to comply with the statute. Failure to include all necessary findings of fact and details is an error of law and a basis for remand under subdivision (b)(4) of this section, because it frustrates appellate review. State ex rel. Utils. Comm'n v. AT & T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

**The Commission was required to make specific finds showing what effect,** if any, it gave to financing costs or down market protection, or both, in arriving at its common equity rate of return decision. Failure to do so constituted an error of law requiring a remand for further proceedings. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

**Function of Court on Review.** — The Court of Appeals looks to the findings of fact and conclusions of the Commission and determines whether the Commission has considered the factors required by law and whether its findings are supported by competent, substantial and material evidence in view of the whole record. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The test upon appeal from a determination of the Utilities Commission is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 332 S.E.2d 397, rev'd on other grounds, 476 U.S. 953, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986).

The Supreme Court's statutory function is not to determine whether there is evidence to support a position the Commission did not adopt. The court asks instead, whether there is substantial evidence, in view of the entire record, to support the position which the Commission adopted. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

Appellate court's statutory function is to assess whether the North Carolina Utilities Commission's order is affected by errors of law and to determine whether there is substantial evidence, in view of the entire record, to support the position adopted. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

**Substantial Evidence Defined.** — Substantial evidence is defined as "more than a scintilla or a permissible inference." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

**Commission may agree with single witness,** if the evidence supports his position, no matter how many opposing witnesses might come forward. The court is then required to determine whether the Commission's decision is supported by competent, material and substantial evidence in view of the entire record as submitted. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

**Evidence of Reasonableness of Practice.** — Where the Commission's order required the defendants to do no more than they did voluntarily and without objection for 30 years or more, preceding the last six or eight years, this would seem to be "strong evidence" of the reasonableness of the practice. State ex rel. Utils. Comm'n v. Southern Ry., 256 N.C. 359, 124 S.E.2d 510 (1962).

**Findings, inferences, conclusions or decision of Utilities Commission which are arbitrary** or capricious and which prejudice substantial rights of appellants are not binding on reviewing court. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

**Subsection (c) requires the reviewing court to take due note of the rule of prejudicial error.** State ex rel. Utils. Comm'n v. General Tel. Co., 285

N.C. 671, 208 S.E.2d 681 (1974).

Due account shall be taken of the rule of prejudicial error in the consideration of an appeal. State ex rel. Utils. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

### III. LIMITATIONS ON REVIEW.

#### A. In General.

**Limitation on Authority to Review.** — The authority of the Court of Appeals and of the Supreme Court in reviewing an order of the Utilities Commission is limited to that conferred by this section. State ex rel. Utils. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970), aff'd on rehearing, 278 N.C. 235, 179 S.E.2d 419 (1971).

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Intervenor Residents, 305 N.C. 62, 286 S.E.2d 770 (1982).

Courts do not ordinarily review or reverse the exercise of discretionary power by an administrative agency such as the Utilities Commission, except on showing of capricious, unreasonable or arbitrary action or disregard of law. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

On review of orders from the Commission, the Court of Appeals' action is guided by this section, and where the Commission's actions do not violate the Constitution or exceed statutory authority, appellate review is limited to errors of law, arbitrary action, or decisions unsupported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

The authority of an appellate court to reverse or modify an order of the Utilities Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in this section, which includes the authority to reverse or modify such order on the ground that it violates a constitutional provision. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 396, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

Under applicable standards of appellate review, the Court of Appeals is not at liberty to substitute its judgment for that of the Commission. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

**Court's Power to Reverse, Modify or Nullify Substantially Circumscribed.** — The court's power to affirm or remand is not specifically circumscribed by this section. However, the power of the court to reverse or modify and, a fortiori, to declare null and void, is substantially circumscribed. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982).

**Appellate review of Commission orders is limited to the record** as certified. State ex rel. Utils Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

**Appeals Are Confined to Questions of Law Specifically Set Forth.** — Appeals from the Utilities Commission are confined to questions of law upon grounds specifically set forth in appellant's petition for rehearing by the Commission. State ex rel. Utils. Comm'n v. Queen City Coach Co., 233 N.C. 119, 63 S.E.2d 113 (1951). See also State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

**As to necessity for raising grounds for relief before Commission,** see State ex rel. Utils. Comm'n v. State, 250 N.C. 410, 109 S.E.2d 368 (1959).

#### B. Weighing of Evidence.

**Weighing of Evidence and Exercise of Judgment Thereon Are Matters for Commission.** — The decisions of the Utilities Commission must be within the authority conferred by statute; however, the weighing of the evidence and the exercise of judgment thereon as to transportation problems within the scope of its powers are matters for the Commission. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

**Commission Without Discretionary Power Where No Evidence to Weigh.** — The weighing of the evidence and the exercise of judgment thereon within the scope of its authority are matters for the Commission; even so, the Commission has no discretionary power, where its function is to weigh the evidence and make judgment thereon, if there is no evidence to weigh. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

**Minimal Consideration of Competent Evidence Correctable on Appeal.** — Although it is not for an appellate court to dictate to the Commission what weight it should give to material facts before it, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

**Comments on Evidence.** — The Commission is not required to set forth comments regarding every single fact or item of evidence presented by the parties. Dennis v Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994), modified, 341 N.C. 91, 459 S.E.2d 707 (1995).

**Presumption That Commission Considered All Competent Evidence.** — In the absence of an express statement by the Commission to the contrary, some record evidence to the contrary, or a summary disposition which indicates to the contrary, the court would presume that the Commission gave proper consideration to all competent evidence presented. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 324 S.E.2d 28 (1986).

**The credibility of testimony and the weight to be given it are for the Commission,** not for the reviewing court. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The credibility of testimony was for the determination of the Commission. State ex rel. Utils. Comm'n v. General Tel. Co., 285 N.C. 671, 208 S.E.2d 681 (1974).

It is a well-established rule that it is for administrative body, in an adjudicatory proceeding, to determine weight and sufficiency of evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

The credibility of testimony and the weight to be accorded it are matters to be determined by the Commission. However, a summary disposition which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

## IV. PRIMA FACIE JUST AND REASONABLE.

### A. In General.

**Commission's Decision Is Prima Facie Just and Reasonable.** — This section provides that on an appeal, the Commission's decision is considered "prima facie just and reasonable," and it should be affirmed if supported by substantial evidence. State ex rel. Utils. Comm'n v. Southern Coach Co., 19 N.C. App. 597, 199 S.E.2d 731 (1973), cert. denied, 284 N.C. 623, 201 S.E.2d 693 (1974).

**Burden Is on Appellant to Show Error of Law in Proceedings.** — The law imposes the duty upon the Utilities Commission and not the courts to fix rates, and the burden is upon appellant from an order of the Commission to show an error of law in the proceeding before the Commission. State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 59 N.C. App. 240, 296 S.E.2d 487 (1982), rev'd on other grounds, 309 N.C. 238, 306 S.E.2d 113 (1983); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

The party attacking rates established by the Commission bears the burden of proving their impropriety. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

**But Appellant May Show That Order Was Unsupported by Evidence.** — Upon appeal the orders made by the Utilities Commission "shall be prima facie just and reasonable," but this does not preclude the appellant from showing that the evidence offered rebuts the prima facie effect of the order, and that the order was unsupported by competent, material and substantial evidence in view of the entire record. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 235 N.C. 273, 69 S.E.2d 502 (1952); State ex rel. Utils. Comm'n v. Gulf-Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886 (1959).

An order of the Commission requiring a transportation company to maintain public service facilities must be considered prima facie reasonable and just, but this does not preclude the transportation company affected from showing that the order was unsupported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Atlantic C.L.R.R., 238 N.C. 701, 78 S.E.2d 780 (1953); State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

While the determination of a petition by a carrier to be allowed to discontinue an established service rests in large measure in the sound judgment and discretion of the Utilities Commission, and its order in regard thereto is prima facie just and reasonable, such order is reviewable to ascertain whether it is arbitrary or capricious or if the essential findings of fact on which it is based are supported by competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Southern Ry., 254 N.C. 73, 118 S.E.2d 21 (1961).

### B. Rates.

**Rates Are Deemed Prima Facie Just and Reasonable.** — Upon appeal, rates fixed by the Commission shall be deemed prima facie just and reasonable. State ex rel. N.C. Utils. Comm'n v. Westco Tel. Co., 266 N.C. 450, 146 S.E.2d 487 (1966); State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

Rates fixed by the Commission are deemed prima facie just and reasonable. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

**Legitimate Justification for Industrial and City Rates of Return.** — The North Carolina Utilities Commission drew legitimate distinctions which justified its decision to maintain industrial and cities' rates of return at a higher level than residential and commercial and small industrial rates. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

**Rates of Return Reasonable and Not Discriminatory.** — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the approved rates of return were just and reasonable and did not unreasonably discriminate among the various classes of North Carolina Natural Gas Corporation customers and were supported by substantial evidence in view of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

**Order prescribing different Private Line Service rates for AT&T's nonreseller (end user) customers and its reseller customers** upon its face was discriminatory, and absent legally adequate reasons in the order why the order was not unjustly discriminatory within the meaning of § 62-2(4), the order was vacated and the cause is remanded to the Commission for further proceedings. State ex rel. Utils. Comm'n v. AT&T Communications of S. States, Inc., 321 N.C. 586, 364 S.E.2d 386 (1988).

**Determining a Utility's Capital Structure for Rate Making Purposes.** — The Commission is not required, as a matter of law, to reduce the common equity component of a utility's capital structure by an amount equal to its investment in its nonregulated subsidiaries in determining the appropriate capital structure for rate making purposes. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

### C. Findings.

**Findings of fact made by the Commission are prima facie just and reasonable** on appeal. State ex rel. Utils. Comm'n v. Eddleman, 320 N.C. 344, 358 S.E.2d 339 (1987).

**Court May Not Find Facts or Regulate Utilities.** — Although in reviewing an order of the Commission, a court might, upon the same facts, have reached a different result, it is not for the court to find the facts or to regulate utilities. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

When an appeal to the superior court (now to the Court of Appeals) is taken from an order entered by the North Carolina Utilities Commission, the review is limited to the record as certified and to the questions of law presented therein. There is no provision for additional findings of fact by the judge for the purpose of determining the validity of the order entered by the Commission. State ex rel. Utils. Comm'n v. Fox, 236 N.C. 553, 73 S.E.2d 464 (1952); State v.

Ray, 236 N.C. 692, 73 S.E.2d 870 (1953). See State ex rel. Utils. Comm'n v. Mead Corp., 238 N.C. 451, 78 S.E.2d 290 (1953).

**Findings supported by competent, material and substantial evidence in view of the entire record are binding** upon the reviewing court. State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966); State ex rel. Utils. Comm'n v. Carolina Coach Co., 269 N.C. 717, 153 S.E.2d 461 (1967); State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 43 N.C. App. 662, 259 S.E.2d 791 (1979); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 47 N.C. App. 418, 267 S.E.2d 488 (1980); State ex rel. Utils. Comm'n v. M.L. Hatcher Pickup & Delivery Servs., Inc., 48 N.C. App. 115, 268 S.E.2d 851 (1980). See also, State ex rel. Utils. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

All findings of fact made by the Commission, which are supported by competent, material and substantial evidence, are conclusive. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972); State ex rel. Utils. Comm'n v. Public Staff, 52 N.C. App. 275, 278 S.E.2d 599 (1981); State ex rel. Utils. Comm'n v. North Carolina Textile Mfrs. Ass'n, 313 N.C. 215, 328 S.E.2d 264 (1985); State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

When the Commission's findings are supported by competent, material and substantial evidence, they are binding upon the appellate court. State ex rel. Utils. Comm'n v. Farmers Chem. Ass'n, 33 N.C. App. 433, 235 S.E.2d 398, cert. denied, 293 N.C. 258, 237 S.E.2d 539 (1977).

The Commission's findings and conclusions, where supported by competent, material, and substantial evidence, considering the whole record, and taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn, must be affirmed. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 57 N.C. App. 489, 291 S.E.2d 789 (1982), modified, 307 N.C. 541, 299 S.E.2d 763 (1983).

The Commission's order will not be disturbed if upon consideration of the entire record the court finds that the decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 322 N.C. 689, 370 S.E.2d 567 (1988).

**Even Though Reviewing Court Might Have Reached Different Conclusion.** — Neither findings of fact nor the Commission's determination of what rates are reasonable may be reversed or modified by a reviewing court merely because the court would have reached a different finding or determination upon the evidence. State ex rel. Utils. Comm'n v. General Tel. Co., 281 N.C. 318, 189 S.E.2d 705 (1972); State ex rel. Utils. Comm'n v. Thornburg, 314 N.C. 509, 334 S.E.2d 772 (1985).

If the rates are reasonable upon an application of the whole record test, the Court of Appeals is bound by the findings of fact establishing them and may not reach a different finding merely because it could have reached another determination upon the evidence. State ex rel. Utils. Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980).

When the record, considered as a whole, contains substantial evidence supporting the subjective judgment of the Commission on any of the factors in the fixing of reasonable rates under § 62-133, the conclusion reached by the Commission may not be disturbed by a reviewing court merely because the court's subjective judgment is different from that of the Commission, nor is the Commission required to accept as conclusive the subjective judgment of a witness, even though the record contains no expression of a contrary opinion by another witness. State ex rel. Utils. Comm'n v. Edmisten, 29 N.C. App. 428, 225 S.E.2d 101, aff'd, 291 N.C. 424, 230 S.E.2d 647 (1976).

The authority to determine the adequacy of a utility's service and the rates to be charged lies with the Commission, and a reviewing court may not modify or reverse its determination merely because the court would have reached a different finding based on the evidence. State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 317

N.C. 26, 343 S.E.2d 898 (1986); State ex rel. Utils. Comm'n v. Public Staff-North Carolina Utils. Comm'n, 91 N.C. 107, 370 S.E.2d 567 (1988).

Any finding of fact made by the Commission, if supported by competent, material and substantial evidence is conclusive, even if the reviewing court would have reached a different result on the same evidence. State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 88 N.C. App. 153, 363 S.E.2d 73 (1987).

**Finding Held Error of Law.** — Finding of the Commission that legal fees which were incurred by utility in contesting the amount of an administrative penalty imposed as a result of its failure to provide adequate water service were recoverable as part of its operating expenses, in that they were "a reasonable and necessary expenditure" which was associated with its water service to its customers, constituted an error of law under subdivision (b)(4) of this section. State ex rel. Utils. Comm'n v. Public Staff, 317 N.C. 26, 343 S.E.2d 898 (1986).

**Where the individualized nature of a shuttle operation precluded performance by a common carrier,** the Utilities Commission erred as a matter of law in finding that performance of the shuttle contract constituted common carriage. State ex rel. Utils. Comm'n v. Tar Heel Indus., Inc., 77 N.C. App. 75, 334 S.E.2d 396 (1985).

**Formula Did Not Unreasonably Discriminate.** — The North Carolina Utilities Commission's order contained findings sufficient to justify its conclusion that the Industrial Sales Tracker Formula did not unreasonably discriminate between North Carolina Natural Gas Corporation's customer classes and these findings were supported by substantial evidence in light of the whole record. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 323 N.C. 238, 372 S.E.2d 692 (1988).

### D. Determinations.

**Determination by Commission Is Prima Facie Just and Reasonable.** — A determination by the Commission is not simply prima facie evidence of its validity, but is prima facie just and reasonable. State ex rel. Utils. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953); State ex rel. N.C. Utils. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955); State ex rel. N.C. Utils. Comm'n v. Casey, 245 N.C. 297, 96 S.E.2d 8 (1957); State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

**The Commission, not the reviewing court, is to make determination of fair value** of the properties. State ex rel. Utils. Comm'n v. City of Durham, 282 N.C. 308, 193 S.E.2d 95 (1972).

While the Commission has the duty to weigh evidences of "fair value" fairly and in "balanced scales," the reviewing court may not set aside the Commission's determination of "fair value" merely because the court would have given the respective elements different weights and would, therefore, have arrived at a different "fair value." State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co., 15 N.C. App. 41, 189 S.E.2d 777 (1972).

The Supreme Court may not reverse an order of the Commission because of its weighting of the respective indicators of "fair value," unless it finds such weighting to have been arbitrary and lacking support in the evidence, in view of the entire record, or otherwise affected by error of law. State ex rel. Utils. Comm'n v. VEPCO, 285 N.C. 398, 206 S.E.2d 283 (1974).

**The question of whether a case "is to be a general rate case" under the terms of § 62-137 is a mixed question** of law and fact. As to such questions, courts should be hesitant to disturb the Commission's expert determination with regard to the nature of the case presented, particularly when its determination is made prior to hearing and for the initial purpose of setting the scope of the hearing and the resulting amount of information which the public utility will be required to furnish. Even at that stage, however, the Commission's determination must be supported by "competent, material and substantial evidence in view of the entire record as submitted." State ex rel. Utils. Comm'n v. Rail Common Carriers, 42 N.C. App. 314, 256 S.E.2d 508 (1979).

**What constitutes public convenience and necessity is primarily an administrative question** with a number of imponderables to be taken into consideration, e.g., whether there is a substantial public need for the service, whether the existing carriers can reasonably meet this need, and whether the service would endanger or impair the operations of existing carriers contrary to the public interest. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

### E. Orders.

**Order of Commission Is Prima Facie Just and Reasonable.** — By this section an order of the Commission is prima facie just and reasonable. This applies to orders approving contracts of public utilities. State ex rel. Utils. Comm'n v. Carolina Coach Co., 260 N.C. 43, 132 S.E.2d 249 (1963).

**When Order Will Be Affirmed.** — Where the order of the Utilities Commission granting petitioner an increase in rates in a general rate case is justified by the findings of fact which are supported by plenary evidence, the order of the Commission will be affirmed. State ex rel. Utils. Comm'n v. Tidewater Natural Gas Co., 259 N.C. 558, 131 S.E.2d 303 (1963).

The rate order of the Commission will be affirmed if upon consideration of the whole record the appellate court finds that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 287 S.E.2d 786 (1982); State ex rel. Utils. Comm'n v. Thornburg, 316 N.C. 238, 342 S.E.2d 28 (1986).

**When Order Remanded to Commission for Further Hearing.** — An order of the Commission based on an erroneous interpretation of law should be remanded to the Commission for further hearing and not be terminated by the court where the Commission has the duty to make a positive determination, such as the fixing of rates, and because of some error of law the determination is in suspense, and the utility is entitled to have the determination made. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

**Inadequate Order.** — Order which set forth specific complaints from some customers, but did not state what to do to make the service adequate, and did not indicate in what manner the company violated the Commission's standards, nor what those standards were, was inadequate. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

## V. CASES DECIDED PRIOR TO 1949 REVISION OF PROCEDURAL SECTIONS.

***Editor's Note.*** — *All of the cases below were decided before the 1949 revision of the procedural provisions of this Chapter, and construe former §§ 62-20 and 62-21, corresponding to § 62-90 and this section. It should be noted that the 1949 revision made many changes in procedure, and especially in the extent of review.*

**Appeal to Superior Court Under Former Law Was Trial De Novo.** — Upon appeal under the former statute by a party to a proceeding before the Corporation Commission from an order made therein under former §§ 62-42 and 62-43, the superior court had jurisdiction to try and determine both issues of law and issues of fact, duly presented by assignments of error based upon exceptions duly taken by the appellant during the hearing before the Commission. The trial of such issues by the superior court was de novo. State ex rel. Corp. Comm'n v. Southern Ry., 196 N.C. 190, 145 S.E. 19 (1928). See also State ex rel. Corp. Comm'n v. Seaboard Air Line & S. Ry., 161 N.C. 270, 76 S.E. 554 (1912).

A provision of former § 62-21 that on appeal the trial should be "under the same rules and regulations as are prescribed for the trial of other civil causes" meant that the trial should be de novo. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943). See also North Carolina Corp. Comm'n v. Winston-Salem Southbound Ry., 170 N.C. 560, 87 S.E. 785 (1916).

Under this Chapter as it stood before the 1949 revision, the trial in the superior court was de novo, and from thence only would a further appeal lie to the Supreme Court, governed by the rule that such an appeal should not be fragmentary, but should be from a final judgment or one final in its nature. State ex rel. Corp. Comm'n v. Cannon Mfg. Co., 185 N.C. 17, 116 S.E. 178 (1923).

**Rules Applicable on Appeal to Superior Court.** — Prior to the 1949 revision, on appeal to the superior court the trial was under the same rules and regulations applicable in other civil causes, save and except the prima facie effect to be given the decision or determination of the Commission. State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

**Appeals from the Utilities Commissioner were analogous to appeals from a justice of the peace** rather than appeals from a referee; hence, since the trial in the superior court was de novo upon issues of fact raised by the exceptions, the superior court properly refused to pass upon appellant's exceptions to the findings of fact seriatim. State ex rel. Utils. Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

**Decision of Commission "Prima Facie Just and Reasonable".** — While on appeal from the Utilities Commission to the superior court the provision of former § 62-21 was interpreted to mean that the trial should be de novo, the section also provided that the decision or determination of the Commission "shall be prima facie just and reasonable." State ex rel. Utils. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 28 S.E.2d 201 (1943).

**Findings of Fact Not Conclusive.** — Former §§ 62-20 and 62-21 did not contain any provision that the findings of fact by the Utilities Commission should be conclusive on appeal. State ex rel. Unemployment Comp. Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

**What Evidence Admissible.** — On appeal from an order of the Commission under former § 62-21 the trial was de novo, tried under the same rules and regulations as are prescribed for the trial of other civil causes; and any relevant evidence could be there introduced, whether it had theretofore been introduced before the Commission or not. State ex rel. Corp. Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

**Admission of Evidence Held Reversible Error.** — Where a union passenger depot had been ordered by the Commission, it was reversible error in the superior court, on appeal from the Commission, for the trial judge to admit evidence as to the effect the relocation would have on property values in a nearby town where the present station of one of the roads was located. State ex rel. Corp. Comm'n v. Seaboard Air Line Ry., 161 N.C. 270, 76 S.E. 554 (1912).

**When Appellee Entitled to Affirmance of Decision.** — Under former § 62-21, in the absence of a showing that the decision of the Utilities Commission was clearly unreasonable and unjust, appellee, on appeal to the superior court, was entitled to an affirmance of the decision of the Commission. State ex rel. N.C. Utils. Comm'n v. Carolina Coach Co., 224 N.C. 390, 30 S.E.2d 328 (1944).

**In an application for a certificate of public convenience and necessity,** the Utilities Commission must act within the authority conferred by the statute; however, the findings from the evidence and the exercise of judgment thereon within the scope of its powers are matters for the Commission, and its order will not be disturbed when sustained by the findings upon competent, material and substantial evidence. State ex rel. Utils. Comm'n v. Fredrickson Motor Express, 232 N.C. 180, 59 S.E.2d 582 (1950).

## Article 5A.

## *Siting of Transmission Lines.*

### § 62-100. Definitions.

As used in this Article:

(1) The term "begin to construct" includes any clearing of land, excavation, or other action that would adversely affect the natural environment of the route of a transmission line; but that term does not include land surveys, boring to ascertain geological conditions, or similar preliminary work undertaken to determine the suitability of proposed routes for a transmission line that results in temporary changes to the land;

(2) The word "county" means any one of the counties listed in G.S. 153A-10;

(3) The word "land" means any real estate or any estate or interest in real estate, including water and riparian rights, regardless of the use to which it is devoted;

(4) The word "lines" means distribution lines and transmission lines collectively;
(5) The word "municipality" means any incorporated community, whether designated as a city, town, or village and any area over which it exercises any of the powers granted by Article 19 of Chapter 160A of the General Statutes;
(6) The term "public utility" means a person, whether organized under the laws of this State or under the laws of any other state or country, engaged in producing, generating, transmitting, delivering, or furnishing electricity for private or public use, including counties, municipalities, joint municipal power agencies, electric membership corporations, and public and private corporations; and
(7) The term "transmission line" means an electric line designed with a capacity of at least 161 kilovolts. (1991, c. 189, s. 1.)

**Editor's Note.** — Session Laws 1991, c. 189, s. 3, made this Article effective December 1, 1991, but provides that the Article shall not apply to any transmission line that the public utility or other person has begun to construct before that date.

### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

## § 62-101. Certificate to construct transmission line.

(a) No public utility or any other person may begin to construct a new transmission line without first obtaining from the Commission a certificate of environmental compatibility and public convenience and necessity.

(b) A transmission line for which a certificate is required shall be constructed, operated, and maintained in conformity with the certificate. A certificate may be amended or transferred with the approval of the Commission.

(c) A certificate is not required for construction of the following lines:
(1) A line designed to carry less than 161 kilovolts;
(2) The replacement or expansion of an existing line with a similar line in substantially the same location, or the rebuilding, upgrading, modifying, modernizing, or reconstructing of an existing line for the purpose of increasing capacity or widening an existing right-of-way;
(3) A transmission line over which the Federal Energy Regulatory Commission has licensing jurisdiction, if the Commission determines that agency has conducted a proceeding substantially equivalent to the proceeding required by this Article;
(4) Any transmission line for which, before March 6, 1989, a public utility or other person has surveyed a proposed route and, based on that route, has acquired rights-of-way for it by voluntary conveyances or has filed condemnation pro-

ceedings for acquiring those rights-of-way which, together, involve twenty-five percent (25%) or more of the total length of the proposed route;

(5) An electric membership corporation owned transmission line for which the construction or upgrading has had a proceeding conducted which the Commission determines is substantially equivalent to the proceeding required by this Article;

(6) Any line owned by a municipality to be constructed wholly within the corporate limits of that municipality.

(d) The Commission may waive the notice and hearing requirements of this Article and issue a certificate or amend an existing certificate under either of the following circumstances:

(1) When the Commission finds that the owners of land to be crossed by the proposed transmission line segment do not object to such a waiver and either:
  a. The transmission line will be less than one mile long; or
  b. The transmission line is for the purpose of relocating an existing transmission line segment to resolve a highway or other public project conflict; to accommodate a commercial, industrial, or other private development conflict; or to connect an existing transmission line to a substation, to another public utility, or to a public utility customer when any of these is in proximity to the existing transmission line.

(2) If the urgency of providing electric service requires the immediate construction of the transmission line, provided that the Commission shall give notice to those parties listed in G.S. 62-102(b) before issuing a certificate or approving an amendment.

(e) When justified by the public convenience and necessity and a showing that circumstances require immediate action, the Commission may permit an applicant for a certificate to proceed with initial clearing, excavation, and construction before receiving the certificate required by this section. In so proceeding, however, the applicant acts at its own risk, and by granting such permission, the Commission does not commit to ultimately grant a certificate for the transmission line.

(f) Nothing in this section restricts or impairs the Commission's jurisdiction pursuant to G.S. 62-73 to hear or make complaints. (1991, c. 189, s. 1.)

### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

## § 62-102. Application for certificate.

(a) An applicant for the certificate described in G.S. 62-101 shall file an application with the Commission containing the following information:

(1) The reasons the transmission line is needed;

(2) A description of the proposed location of the transmission line;

(3) A description of the proposed transmission line;
(4) An environmental report setting forth:
   a. The environmental impact of the proposed action;
   b. Any proposed mitigating measures that may minimize the environmental impact; and
   c. Alternatives to the proposed action.
(5) A list of all necessary approvals that the applicant must obtain before it may begin to construct the transmission line; and
(6) Any other information the Commission requires.

(b) Within 10 days of filing the application, the applicant shall serve a copy of it on each of the following in the manner provided in G.S. 1A-1, Rule 4:

(1) The Public Staff;
(2) The Attorney General;
(3) The Department of Environment, Health, and Natural Resources;
(4) The Department of Commerce;
(5) The Department of Transportation;
(6) The Department of Agriculture;
(7) The Department of Cultural Resources;
(8) Each county through which the applicant proposes to construct the transmission line;
(9) Each municipality through whose jurisdiction the applicant proposes to construct the transmission line; and
(10) Any other party that the Commission orders the applicant to serve.

The copy of the application served on each shall be accompanied by a notice specifying the date on which the application was filed.

(c) Within 10 days of the filing of the application, the applicant shall give public notice to persons residing in each county and municipality in which the transmission line is to be located by publishing a summary of the application in newspapers of general circulation so as to substantially inform those persons of the filing of the application. This notice shall thereafter be published in those newspapers a minimum of three additional times before the time for parties to intervene has expired. The summary shall also be sent to the North Carolina State Clearinghouse. The summary shall be subject to prior approval of the Commission and shall contain at a minimum the following:

(1) A summary of the proposed action;
(2) A description of the location of the proposed transmission line written in a readable style;
(3) The date on which the application was filed; and
(4) The date by which an interested person must intervene.

(d) Inadvertent failure of service on or notice to any municipality, county, governmental agency, or other person described in this section may be cured by an order of the Commission designed to give that person adequate notice to enable effective participation in the proceeding.

(e) An application for an amendment of a certificate shall be in a form approved by and shall contain any information required by the Commission. Notice of such an application shall be in the same manner as for a certificate. (1991, c. 189, s. 1; 1991 (Reg. Sess., 1992), c. 959, s. 18.)

## § 62-103. Parties.

(a) The following persons shall be parties to a certification proceeding under this Article:

(1) The applicant;

(2) The Public Staff.

(b) The following persons may intervene in a certification proceeding under this Article if a petition to intervene is filed with the Commission within 100 days of the filing of the application and the petition is subsequently granted:

(1) Any State department, municipality, or county entitled to notice under G.S. 62-102(b);

(2) Any person whose land will be crossed by the proposed line;

(3) Any other person who can show a substantial interest in the certification proceeding. (1991, c. 189, s. 1.)

## § 62-104. Hearings.

(a) The Commission shall schedule a hearing upon each application filed under this Article not more than 120 days after the filing and shall conclude the proceeding as expeditiously as possible. The Commission may, however, extend this time period for substantial cause.

(b) If, after proper notice of the application has been given, no significant protests are filed with the Commission, the Commission may cancel the hearing and decide the case on the basis of the filed record.

(c) The Commission shall issue an order on each application filed under this Article within 60 days of the conclusion of the hearing. The Commission may extend this time period for substantial cause. (1991, c. 189, s. 1.)

## § 62-105. Burden of proof; decision.

(a) The burden of proof is on the applicant in all cases under this Article, except that any party proposing an alternative location for the proposed transmission line shall have the burden of proof in sustaining its position. The Commission may consider any factors that it finds are relevant and material to its decision. The Commission shall grant a certificate for the construction, operation, and maintenance of the proposed transmission line if it finds:

(1) That the proposed transmission line is necessary to satisfy the reasonable needs of the public for an adequate and reliable supply of electric energy;

(2) That, when compared with reasonable alternative courses of action, construction of the transmission line in the proposed location is reasonable, preferred, and in the public interest;

(3) That the costs associated with the proposed transmission line are reasonable;

(4) That the impact the proposed transmission line will have on the environment is justified considering the state of available technology, the nature and economics of the various alternatives, and other material considerations; and

(5) That the environmental compatibility, public convenience, and necessity require the transmission line.

(b) If the Commission determines that the location of the proposed transmission line should be modified, it may condition its certificate upon modifications it finds necessary to make the findings and determinations set forth in subsection (a) of this section. (1991, c. 189, s. 1.)

## § 62-106. Effect of local ordinances.

Within 30 days after receipt of notice of an application as provided by G.S. 62-102, a municipality or county shall file with the Commission and serve on the applicant the provisions of an ordinance that may affect the construction, operation, or maintenance of the proposed transmission line in the manner provided by the rules of the Commission. If the municipality or county does not serve notice as provided above of any such ordinance provisions, the provisions of such ordinance may not be enforced by the municipality or county. If the applicant proposes not to comply with any part of the ordinance, the applicant may move the Commission for an order preempting that part of the ordinance. Service of the motion on the municipality or county by the applicant shall make the municipality or county a party to the proceeding. If the Commission finds that the greater public interest requires it, the Commission may include in a certificate issued under this Article an order preempting any part of such county or municipal ordinance with respect to the construction, operation or maintenance of the proposed transmission line. (1991, c. 189, s. 1.)

## § 62-107. Rules.

Pursuant to G.S. 62-31, the Commission may adopt rules to carry out the purposes of this Article. In addition, the Commission shall adopt rules requiring public utilities to file periodic reports stating their short-term and long-term plans for construction of transmission lines in this State. (1991, c. 189, s. 1.)

### CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

**§§ 62-108, 62-109:** Reserved for future codification purposes.

## ARTICLE 6.

## *The Utility Franchise.*

## § 62-110. Certificate of convenience and necessity.

(a) Except as provided for bus companies in Article 12 of this Chapter, no public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business.

(b) The Commission shall be authorized to issue a certificate to any person applying to the Commission to offer long distance services as a public utility as defined in G.S. 62-3(23)a.6., provided that such person is found to be fit, capable, and financially able to render such service, and that such additional service is required to serve the public interest effectively and adequately; provided further, that in such cases the Commission shall consider the impact on the local exchange customers and only permit such additional service if the Commission finds that it will not jeopardize reasonably affordable local exchange service.

Notwithstanding any other provision of law, the terms, conditions, rates, and interconnections for long distance services offered on a competitive basis shall be regulated by the Commission in accordance with the public interest. In promulgating rules necessary to implement this provision, the Commission shall consider whether uniform or nonuniform application of such rules is consistent with the public interest. Provided further that the Commission shall consider whether the charges for the provision of interconnections should be uniform.

For purposes of this section, long distance services shall include the transmission of messages or other communications between two or more central offices wherein such central offices are not connected on July 1, 1983, by any extended area service, local measured service, or other local calling arrangement.

(c) The Commission shall be authorized, consistent with the public interest, to adopt procedures for the issuance of a special certificate to any person for the limited purpose of offering telephone service to the public by means of coin, coinless, or key-operated pay telephone instruments. This service may be in addition to or in competition with public telephone services offered by the certificated telephone company in the service area. The certificated local exchange telephone company in the service area where any new pay telephone service is proposed shall be the only provider of the access line from the pay instrument to the network, and the rates approved by the Commission for this access line shall be fully compensatory, reflect the business nature of the service, and shall be set on a measured usage rate basis where facilities are available or on a message rate basis otherwise. The Commission shall promulgate rules to implement the service authorized by this section, recognizing the competitive nature of the offerings and, notwithstanding any other provision of law, the Commission shall determine the extent to which such services shall be regulated and to the extent necessary to protect the public interest regulate the terms, conditions, and rates for such service and the terms and conditions for interconnection to the local exchange network.

(d) The Commission shall be authorized, consistent with the public interest and notwithstanding any other provision of law, to adopt procedures for the purpose of allowing shared use and/or resale of any telephone service provided to persons who occupy the same contiguous premises (as such term shall be defined by the Commission); provided, however, that there shall be no "networking" of any services authorized under this subsection whereby two or more premises where such services are provided are connected, and provided further that the certificated local exchange telephone company shall be the only provider of access lines or trunks connecting such authorized service to the telephone network, and that the local service rates approved by the Commission for local exchange lines or trunks being shared or resold shall be fully compensatory and on a measured usage basis where facilities are available or on a message rate basis otherwise. Provided however, the Commission may permit or approve rates on bases other than measured or message for shared service whenever the service is offered to patrons of hospitals, nursing homes, rest homes, licensed retirement centers, members of clubs or students living in quarters furnished by educational institutions, or persons temporarily subleasing a residential premise. The Commission shall issue rules to implement the service authorized by this subsection, considering the competitive nature of the offerings and, notwithstanding any other provision of law, the Commission shall determine the extent to which such services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates charged for such services and the terms and conditions for interconnection to the local exchange network. The Commission shall require any person offering telephone service under this subsection by means of a Private Branch Exchange ("PBX") or key system to secure adequate local exchange trunks from the local exchange telephone company to assure a quality of service equal to the quality of service generally found acceptable by the Commission. Unless otherwise ordered by the Commission for good cause shown by the company, the right and obligation of the local exchange carrier to provide local service directly to any person located within its certificated service area shall continue to apply to premises where shared or resold telephone service is available, provided however, the Commission shall be authorized to establish the terms and conditions under which such services should be provided.

(e) Notwithstanding subsection (d) of this section, the Commission may authorize any telephone services provided to a nonprofit college or university, and its affiliated medical centers, which is qualified under Sections 501 and 170 of the United States Internal Revenue Code of 1986 or which is a State-owned institution, to be shared or resold by that institution on both contiguous campus premises owned or leased by the institution and noncontiguous premises owned or leased exclusively by the institution, provided these services are offered to students or guests housed in quarters furnished by the institution, patrons of hospitals or medical centers of the institution, or persons or businesses providing educational, research, professional, consulting, food, or other support services directly to or for the institution, its students, or guests. The services of the certified local exchange telephone company, when provided to said colleges, universities, and affiliated medical centers shall be rated in the same way as those provided for shared service offered to patrons of hospitals, nursing homes, rest homes, licensed retirement centers, members of clubs or students living in quarters furnished by educational institutions as provided for in subsection (d) of this section. The institutions regulated pursuant to this subsection shall not be prohibited from electing optional services from the certificated local exchange telephone company which include measured or message rate services. There shall be no "networking" of any services authorized under this subsection whereby two or more different institutions where such services are provided are interconnected. The certified local exchange telephone company shall be the only provider of access lines or trunks connecting such authorized services to the telephone network. The Commission shall require such institutions to secure adequate local exchange trunks from the certified local exchange telephone company to assure a quality of service equal to the quality of service generally found acceptable by the Commission. Unless otherwise ordered by the Commission for good cause shown by the certified local exchange telephone company, the right and obligation of the local exchange company to provide local service directly to any person located within its certificated service area shall continue to apply to premises where shared or resold telephone service is available under this subsection, provided however, the Commission shall be authorized to establish the terms and conditions under which such service should be provided. The Commission shall issued rules to implement the services authorized by this subsection.

(f) Reserved.

(f1) Except as provided in subsection (f2) of this section, the Commission is authorized, following notice and an opportunity for interested parties to be heard, to issue a certificate to any person applying to provide local exchange or exchange access services as a public utility as defined in G.S. 62-3(23)a.6., without regard to whether local telephone service is already being provided in the territory for which the certificate is sought, provided that the person seeking to provide the service makes a satisfactory showing to the Commission that (i) the person is fit, capable, and financially able to render such service; (ii) the service to be provided will reasonably meet the service standards that the Commission may adopt; (iii) the provision of the service will not adversely impact the availability of reasonably affordable local exchange service; (iv) the person, to the extent it may be required to do so by the Commission, will participate in the support of universally available telephone service at affordable rates; and (v) the provision of the service does not otherwise adversely impact the public interest. In its application for certification, the person seeking to provide the service shall set forth with particularity the proposed geographic territory to be served and the types of local exchange and exchange access services to be provided. Except as provided in G.S. 62-133.5(f), any person receiving a certificate under this section shall, until otherwise determined by the Commission, file and maintain with the Commission a complete list of the local exchange and exchange access services to be provided and the prices charged for those services, and shall be subject to such reporting requirements as the Commission may require.

Any certificate issued by the Commission pursuant to this subsection shall not permit the provision of local exchange or exchange access service until July 1, 1996, unless the Commission shall have approved a price regulation plan pursuant to G.S. 62-133.5(a) for a local exchange company with an effective date prior to July 1, 1996. In the event a price regulation plan becomes effective prior to July 1, 1996, the Commission is authorized to permit the provision of local exchange or exchange access service by a competing local provider in the franchised area of such local exchange company.

The Commission is authorized to adopt rules it finds necessary (i) to provide for the reasonable interconnection of facilities between all providers of telecommunications services; (ii) to determine when necessary the rates for such interconnection; (iii) to provide for the reasonable unbundling of essential facilities where technically and economically feasible; (iv) to provide for the transfer of telephone numbers between providers in a manner that is technically and economically reasonable; (v) to provide for the continued development and encouragement of universally available telephone service at reasonably affordable rates; and (vi) to carry out the provisions of this subsection in a manner consistent with the public interest, which will include a consideration of whether and to what extent resale should be permitted.

Local exchange companies and competing local providers shall negotiate the rates for local interconnection. In the event that the parties are unable to agree within 90 days of a bona fide request for interconnection on appropriate rates for interconnection, either party may petition the Commission for determination of the appropriate rates for interconnection. The Commission shall determine the appropriate rates for interconnection within 180 days from the filing of the petition.

Each local exchange company shall be the universal service provider in the area in which it is certificated to operate on July 1, 1995, until otherwise determined by the Commission. In continuing this State's commitment to universal service, the Commission shall, by December 31, 1996, adopt interim rules that designate the person that should be the universal service provider and to determine whether universal service should be funded through interconnection rates or through some other funding mechanism. By July 1, 1998, the Commission shall complete an investigation and adopt final rules concerning the provision of universal services, the person that should be the universal service provider, and whether universal service should be funded through interconnection rates or through some other funding mechanism.

The Commission shall make the determination required pursuant to this subsection in a manner that furthers this State's policy favoring universally available telephone service at reasonable rates.

(f2) The provisions of subsection (f1) of this section shall not be applicable to franchised areas within the State that are being served by local exchange companies with 200,000 access lines or less located within the State, and it is further provided that such local exchange company providing service to 200,000 access lines or less shall not be subject to the regulatory reform procedures outlined under the terms of G.S. 62-133.5(a) or permitted to compete in territory outside of its franchised area for local exchange and exchange access services until such time as the franchised area is opened to competing local providers as provided for in this subsection. Upon the filing of an application by a local exchange company with 200,000 access lines or less for regulation under the provisions of G.S. 62-133.5(a), the Commission shall apply the provisions of that section to such local exchange company, but only upon the condition that the provisions of subsection (f1) of this section are to be applicable to the franchised area and local exchange and exchange access services offered by such a local exchange company.

(f3) The provisions of subsection (f1) of this section shall not be applicable to areas served by telephone membership corporations formed and existing under Article 4 of Chapter 117 of the General Statutes and exempt from regulation as public utilities, pursuant to G.S. 62-3(23)d. and G.S. 117-35.

(g) In addition to the authority to issue a certificate of public convenience and necessity and establish rates otherwise granted in this Chapter, the Commission shall be authorized, consistent with the public interest, to adopt procedures for the purpose of allowing resale of water and sewer service provided to persons who occupy the same contiguous premises (as such term shall be defined by the Commission) at a rate or charge which does not exceed the actual purchase price of such service to the provider plus a reasonable administrative fee. The Commission shall issue rules to implement the services authorized by this subsection and, notwithstanding any other provision of this Chapter, the Commission shall determine the extent to which such services shall be regulated and, to the extent necessary to protect the public interest, regulate the terms, conditions, and rates charged for such services. Nothing in this subsection shall be construed to alter the rights, obligations, or remedies of persons providing such services and their customers under any other provision of law. (1931, c. 455; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1983 (Reg. Sess., 1984), c. 1043, s. 2; 1985, c. 676, s. 9; c. 680; 1987, c. 445, s. 1; 1989, c. 451, ss. 1, 2; 1995, c. 27, s. 4; 1995 (Reg. Sess., 1996), c. 753, s. 1.)

**Editor's Note.** — See Editor's note under 62-133.5 regarding Session Laws 1995, c. 27, s. 6.1.

This section, as amended by Session Laws 1995, c. 27, s. 4, which added subsections (f1), (f2), and (f3), does not contain a subsection (f).

**Effect of Amendments.** — The 1995 amendment, effective July 1, 1995, added subsections (f1), (f2), and (f3).

The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, added subsection (g).

## CASE NOTES

I. In General.

### I. IN GENERAL.

**Standing to Contest Application for Certificate.** — Plaintiff utilities which, by virtue of their contiguity to subdivision were in a superior position to any other utility in the area to provide service to the development since no other competitor would be able to provide for subdivision without first obtaining a certificate, and in the event that another company sought a certificate, plaintiffs would be afforded the opportunity to contest the application, had a legitimate expectation of entitlement sufficient to give them a protectible interest so as to challenge city's provision of water to the subdivision. Quality Water Supply, Inc. v. City of Wilmington, 97 N.C. App. 400, 388 S.E.2d 608, cert. denied, 326 N.C. 597, 393 S.E.2d 881, 882 (1990).

**Water Company "Occupies" Through Presence of Water Lines.** — Subsection (a) of this section requires only that a company "occupy" an area not being served by another utility. A water company "occupies" through the presence of its water lines in the territory. Quality Water Supply, Inc. v. City of Wilmington, 97 N.C. App. 400, 388 S.E.2d 608, cert. denied, 326 N.C. 597, 393 S.E.2d 881, 882 (1990).

**Order for Cellular Carriers to Pay Access Charges Held Proper.** — The Utilities Commission did not err by ordering cellular carriers to pay access charges to local exchange companies when providing wide area call reception to their cellular customers. State ex rel. Utilities Comm'n v. Centel Cellular Co., 103 N.C. App. 731, 407 S.E.2d 257 (1991).

**Cited** in State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

## § 62-110.1. Certificate for construction of generating facility; analysis of long-range needs for expansion of facilities.

### CASE NOTES

**Subsection (c) of this section makes it clear that the only purpose of a least-cost planning proceeding** is to assist the Utilities Commission in developing, publicizing, and keeping current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina. Nowhere is it suggested in subsection (c) that the purpose of the proceeding is to issue directives which fundamentally alter a given utility's operations. State ex rel. Utils. Comm'n v. North Carolina Elec. Membership Corp., 105 N.C. App. 136, 412 S.E.2d 166 (1992).

**Scope of Commission's Authority and Jurisdiction.** — North Carolina Utilities Commission's dismissal of petitioner independent power producer's application and its establishment of minimum filing requirements did not constitute an impermissible deviation from the process specifically provided in this section and § 62-82, and some deviation from these sections was not beyond the Commission's authority and jurisdiction. State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993), cert. denied, 335 N.C. 564, 441 S.E.2d 125 (1994).

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

## § 62-110.2. Electric service areas outside of municipalities.

(a) As used in this section, unless the context otherwise requires, the term:

(1) "Premises" means the building, structure, or facility to which electricity is being or is to be furnished; provided, that two or more buildings, structures, or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for commercial, industrial, institutional, or governmental purposes, shall together constitute one "premises," except that any such building, structure, or facility shall not, together with any other building, structure, or facility, constitute one "premises" if the electric service to it is separately metered and the charges for such service are calculated independently of charges for service to any other building, structure, or facility; and

(2) "Line" means any conductor for the distribution or transmission of electricity, other than

a. In the case of overhead construction, a conductor from the pole nearest the premises of a consumer to such premises, or a conductor from a line tap to such premises, and

b. In the case of underground construction, a conductor from the transformer (or junction point, if there be one) nearest the premises of a consumer to such premises.

(3) "Electric supplier" means any public utility furnishing electric service or any electric membership corporation.

(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965, which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965, to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(5) Any premises initially requiring electric service after April 20, 1965, which are not located wholly within 300 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(6) Any premises initially requiring electric service after April 20, 1965, which are located partially within a service area assigned to one electric supplier and partially within a service area assigned to another electric supplier pursuant to subsection (c) hereof, or are located partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and partially within 300 feet of the lines of another electric supplier, as such lines exist on April 20, 1965, or as extended to serve consumers it has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and the electric supplier not so chosen shall not thereafter furnish service to such premises.

(7) Any premises initially requiring electric service after April 20, 1965, which are located only partially within a service area assigned to one electric supplier pursuant to subsection (c) hereof and are located wholly outside the service areas assigned to other electric suppliers and are located wholly more than 300 feet from other electric suppliers' lines, may be served by any electric supplier which the

consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

(8) Every electric supplier shall have the right to serve all premises located wholly within the service area assigned to it pursuant to subsection (c) hereof.

(9) No electric supplier shall furnish temporary electric service for the construction of premises which it would not have the right to serve under this subsection if such premises were already constructed. The construction of lines for, and the furnishing of, temporary service for the construction of premises which any other electric supplier, if chosen by the consumer, would have the right to serve if such premises were already constructed, shall not impair the right of such other electric supplier to furnish service to such premises after the construction thereof, if then chosen by the consumer; nor, unless the consumer chooses to have such premises served by the supplier which furnished the temporary service, shall the furnishing of such temporary service or the construction of a line therefor impair the right of any other electric supplier to furnish service to any other premises which, without regard to the construction of such temporary service line, it has the right to serve.

(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section; provided, that nothing in this section shall restrict the right of an electric supplier to furnish electric service to itself or to exchange or interchange electric energy with, purchase electric energy from or sell electric energy to any other electric supplier.

(c)(1) In order to avoid unnecessary duplication of electric facilities, the Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to electric suppliers all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all electric suppliers as such lines exist on the dates of the assignments; provided, that the Commission may leave unassigned any area in which the Commission, in its discretion, determines that the existing lines of two or more electric suppliers are in such close proximity that no substantial avoidance of duplication of facilities would be accomplished by assignment of such area. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering, among other things, the location of existing lines and facilities of electric suppliers and the adequacy and dependability of the service of electric suppliers, but not considering rate differentials among electric suppliers.

(2) The Commission, upon agreement of the affected electric suppliers, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another; and the Commission, notwithstanding the lack of such agreement, is authorized to reassign to one electric supplier any area or portion thereof theretofore assigned to another,

except premises being served by the other electric supplier or to which any of its facilities for service are attached and except such portions of such area as are within 300 feet of the other electric supplier's lines, upon finding that such reassignment is required by public convenience and necessity. In determining whether public convenience and necessity requires such reassignment, the Commission shall consider, among other things, the adequacy and dependability of the service of the affected electric suppliers, but shall not consider rate differentials between such electric suppliers.

(d) Notwithstanding the provisions of subsections (b) and (c) of this section:

(1) Any electric supplier may furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, upon agreement of the affected electric suppliers; and

(2) The Commission shall have the authority and jurisdiction, after notice to all affected electric suppliers and after hearing, if a hearing is requested by any affected electric supplier or any other interested party, to order any electric supplier which may reasonably do so to furnish electric service to any consumer who desires service from such electric supplier at any premises being served by another electric supplier, or at premises which another electric supplier has the right to serve pursuant to other provisions of this section, and to order such other electric supplier to cease and desist from furnishing electric service to such premises, upon finding that service to such consumer by the electric supplier which is then furnishing service, or which has the right to furnish service, to such premises, is or will be inadequate or undependable, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory.

(e) The furnishing of electric service in any area which becomes a part of any municipality after April 20, 1965, either by annexation or incorporation, (whether or not such area, or any portion thereof, shall have been assigned pursuant to subsection (c) of this section) shall be subject to the provisions of Part 2, Article 16 of Chapter 160A of the General Statutes, and any provisions of this section inconsistent with said Article shall not be applicable within such area after the effective date of such annexation or incorporation. (1965, c. 287, s. 5; 1989 (Reg. Sess., 1990), c. 1024, s. 14.)

## CASE NOTES

I. In General.
II. Municipality.

### I. IN GENERAL.

**Discretion of Utilities Commission.** — In deciding complaints, the Utilities Commission is allowed discretion in fashioning a remedy; the Commission could transfer only service of one cooperative to electric utility rather than all complainants, as long as its action was not capricious or arbitrary. Dennis v. Duke Power Co., 341 N.C. 91, 459 S.E.2d 707 (1995).

**Power to Transfer Discretionary.** — Under subsection (d)(2), once the Utilities Commission has made appropriate findings which would justify a transfer, the power of the Commission to order a transfer is discretionary. Dennis v Duke Power Co., 114 N.C. App. 272, 442 S.E.2d 104 (1994), modified, 341 N.C. 91, 459 S.E.2d 707 (1995).

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

II. MUNICIPALITY.

**Only Limit on City as Supplier of Electric Service is "Reasonable Limits" in § 160A-312.** — Since a municipality is not an "electric supplier" as that term is used in this section its public works commission is not prohibited from supplying electric service to a customer outside city's limits, so long as its extension of service is within "reasonable limitations," as provided for in § 160A-312. South River Elec. Membership Corp. v. City of Fayetteville, 113 N.C. App. 401, 438 S.E.2d 464, cert. denied, 336 N.C. 74, 445 S.E.2d 38 (1994).

## § 62-110.3. Bond required for water and sewer companies.

(a) No franchise may be granted to any water or sewer utility company until the applicant furnishes a bond, secured with sufficient surety as approved by the Commission, in an amount not less than ten thousand dollars ($10,000). The bond shall be conditioned upon providing adequate and sufficient service within all the applicant's service areas, including those for which franchises have previously been granted, shall be payable to the Commission, and shall be in a form acceptable to the Commission. In setting the amount of a bond, the Commission shall consider and make appropriate findings as to the following:

(1) Whether the applicant holds other water or sewer franchises in this State, and if so its record of operation,
(2) The number of customers the applicant now serves and proposes to serve,
(3) The likelihood of future expansion needs of the service,
(4) If the applicant is acquiring an existing company, the age, condition, and type of the equipment, and
(5) Any other relevant factors, including the design of the system.

Any interest earned on a bond shall be payable to the water or sewer company that posted the bond.

(b) Notwithstanding the provisions of G.S. 62-110(a) and subsection (a) of this section, no water or sewer utility shall extend service into territory contiguous to that already occupied without first having advised the Commission of such proposed extension. Upon notification, the Commission shall require the utility to furnish an appropriate bond, taking into consideration both the original service area and the proposed extension. This subsection shall apply to all service areas of water and sewer utilities without regard to the date of the issuance of the franchise.

(c) The utility, the Public Staff, the Attorney General, and any other party may, at any time after the amount of a bond is set, apply to the Commission to raise or lower the amount based on changed circumstances.

(d) The appointment of an emergency operator, either by the superior court in accordance with G.S. 62-118(b) or by the Commission with the consent of the owner or operator, operates to forfeit the bond required by this section. The court or Commission, as appropriate, shall determine the amount of money needed to alleviate the emergency and shall order that amount of the bond to be paid to the Commission as trustee for the water or sewer system.

(e) If the person who operated the system before the emergency was declared desires to resume operation of the system upon a finding that the emergency no longer exists, the Commission shall require him to post a new bond, the amount of which may be different from the previous bond. (1987, c. 490, s. 2; 1995, c. 28, s. 1.)

**Effect of Amendments.** — The 1995 amendment, effective April 10, 1995, in subsection (a), deleted "nor more than two hundred thousand dollars ($200,000)" from the end of the first sentence, added "and make appropriate findings as to the following" to the end of the second sentence; in subdivision (a)(4) inserted "condition, and type" following "age"; in subdivision (a)(5) added "including the design of the system" to the end; and rewrote subsection (b).

## § 62-111. Transfers of franchises; mergers, consolidations and combinations of public utilities.

(a) No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity. Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets.

(b) No certificates issued under the provisions of this Chapter for motor carriers of passengers shall be sold, assigned, pledged, transferred, or control changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any motor carrier of passengers be made through acquisition of control by stock purchases or otherwise, except after application to and written approval by the Commission as in this section provided, provided that the above provisions shall not apply to regular trading in listing securities on recognized markets. The applicant shall give not less than 10 days' written notice of such application by registered mail or by certified mail to all connecting and competing carriers. When the Commission is of the opinion that the transaction is consistent with the purposes of this Chapter the Commission may, in the exercise of its discretion, grant its approval, provided, however, that when such transaction will result in a substantial change in the service and operations of any motor carrier of passengers party to the transaction, or will substantially affect the operations and services of any other motor carrier, the Commission shall not grant its approval except upon notice and hearing as required in G.S. 62-262.1 for bus companies upon an application for an original certificate. In all cases arising under the subsection it shall be the duty of the Commission to require the successor carrier to satisfy the Commission that the operating debts and obligations of the seller, assignor, pledgor, lessor or transferor, including taxes due the State of North Carolina or any political subdivision thereof are paid or the payment thereof is adequately secured. The Commission may attach to its approval of any transaction arising under the section such other conditions as the Commission may determine are necessary to effectuate the purposes of this Article.

(c) No sale of a franchise for a motor carrier of household goods shall be approved by the Commission until the seller shall have filed with the Commission a statement under oath of all debts and claims against the seller, of which such seller has any knowledge or notice, (i) for gross receipts, use or privilege taxes due or to become due the State, as provided in the Revenue Act, (ii) for wages due employees of the seller, other than salaries of officers and in the case of motor carriers, (iii) for unremitted C.O.D. collections due shippers, (iv) for loss of or damage to goods transported, or received for transportation, (v) for overcharges on property transported, and, (vi) for interline accounts due other carriers, together with a bond, if required by the Commission, payable to the State, executed by a surety company authorized to do business in the State, in an amount double the aggregate of all such debts and claims conditioned upon the payment of the same within the amount of such bond as the amounts and validity of such debts and claims are established by agreement of the parties, or by judgment. This subsection shall not be applicable to sales by personal representatives of deceased or incompetent persons, receivers or trustees in bankruptcy under court order.

(d) No person shall obtain a franchise for the purpose of transferring the same to another, and an offer of such transfer within one year after the same was obtained shall be prima facie evidence that such certificate was obtained for the purpose of sale.

(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has been continuously offered to the public up to the time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112(b)(5). Provided, however, the Commission shall approve, without imposing conditions or limitations, applications for the transfer of a bus company franchise made under this section upon finding that the person acquiring the franchise or control of the franchise is fit, willing and able to perform services to the public under that franchise. (1947, c. 1008, s. 22; 1949, c. 1132, s. 20; 1953, c. 1140, s. 3; 1957, c. 1152, s. 10; 1961, c. 472, ss. 6, 7; 1963, c. 1165, s. 1; 1967, c. 1202; 1985, c. 676, ss. 10, 11; 1995, c. 523, s. 2.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, in subsection (b) deleted "or permits" following "certificates" in the first sentence, in the third sentence deleted "G.S. 62-262 for contract carriers of passengers and" preceding "G.S. 62-262.1" and deleted "or permit" from the end of the sentence; substituted "household goods" for "property" in the first sentence of subsection (c); and deleted "or permit" following "certificate" in subsection (d).

## CASE NOTES

**Public Convenience and Necessity for Proposed Transfers of Water and Sewer Franchises.** — When the commission is adjudging public convenience and necessity in the context of proposed transfers of water and sewer franchises under subsection (a) of this section, it must inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

**Question of Whether Purchaser of Water or Sewer Franchise Can Provide Better Service.** — The question of whether another potential purchaser of a water or sewer franchise can provide better service is plainly relevant under the broad public convenience and necessity test of subsection (a) of this section. But such a showing would not of itself be dispositive of the issue of whether approval should be granted. When weighing the broad aspects and implications of public convenience and necessity, the Commission is cloaked with wide discretion and is not required to reject an application for transfer merely because another potential purchaser produces evidence that it might be able to do a better job. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

**Transfers of Utility Franchises Cannot be Made Contingent Upon Commission Approval.** — Lawful transfers of ownership and control of utility franchises cannot be made contingent upon or subject to commission approval; however, in emergency situations, the Commission can issue temporary or interim orders giving conditional or temporary approval of operational control. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

This section does not permit the completion of transfers contingent upon or subject to Commission approval; the legislature, by the unambiguous terms of the statute, clearly intended to prohibit de facto transfers of franchises before the Commission has had the opportunity to pass upon the merits of the transfer under the public convenience and necessity test. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

**"Fit, Willing, and Able" Condition of Approval Is Relevant Under Subsection (a).** — The "fit, willing, and able" condition of approval set forth in subsection (e) pertaining to transfers of motor carrier franchises is also a relevant question under the separate public convenience and necessity test of subsection (a). State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

**Subsection (e) Operates as Separate Test.** — The plain language of subsection (e) of this section unambiguously indicates the intent of the legislature for that section to operate as a separate and distinct test, applying only to transfers of motor carrier franchises; that the broader public convenience and necessity test necessarily subsumes under it some of the same elements does not alter this fact. State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

**Subsection (e) is inapplicable to transfer approval proceedings involving water and sewer franchises.** State ex rel. Utils. Comm'n v. Village of Pinehurst, 99 N.C. App. 224, 393 S.E.2d 111 (1990), aff'd, 331 N.C. 278, 415 S.E.2d 199 (1992).

## § 62-112. Effective date, suspension and revocation of franchises; dormant motor carrier franchises.

(a) Franchises shall be effective from the date issued unless otherwise specified therein, and shall remain in effect until terminated under the terms thereof, or until suspended or revoked as herein provided.

(b) Any franchise may be suspended or revoked, in whole or in part, in the discretion of the Commission, upon application of the holder thereof; or, after notice and hearing, may be suspended or revoked, in whole or in part, upon complaint, or upon the Commission's own initiative, for wilful failure to comply with any provision of this Chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition or limitation of such franchise; provided, however, that any such franchise may be suspended by the Commission upon notice to the holder or lessee thereof without a hearing for any one or more of the following causes:

(1) For failure to provide and keep in force at all times security, bond, insurance or self-insurance for the protection of the public as required in G.S. 62-268 of this Chapter.

(2) For failure to file and keep on file with the Commission applicable tariffs or schedules of rates as required in this Chapter.

(3) For failure to pay any gross receipts, use or privilege taxes due the State of North Carolina within 30 days after demand in writing from the agency of the State authorized by law to collect the same; provided, that this subdivision shall not apply to instances in which there is a bona fide controversy as to tax liability.

(4) For failure for a period of 60 days after execution to pay any final judgment rendered by a court of competent jurisdiction against any holder or lessee of a franchise for any debt or claim specified in G.S. 62-111(b) and (c).

(5) For failure to begin operations as authorized by the Commission within the time specified by order of the Commission, or for suspension of authorized operations for a period of 30 days without the written consent of the Commission, save in the case of involuntary failure or suspension brought about by compulsion upon the franchise holder or lessee.

(c) The failure of a common carrier of passengers or household goods by motor vehicles to perform any transportation for compensation under the authority of its certificate for a period of 30 consecutive days shall be prima facie evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate. Upon finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is authorized to find that the franchise is dormant and to cancel the certificate of such common carrier. The Commission in its discretion may give consideration in such finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, the efforts of the carrier to make its services known to the public, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be canceled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. Any motor carrier who has obtained authority to suspend operations under the provisions of G.S. 62-112(b)(5) and the rules of the Utilities Commission issued thereunder shall not be subject to cancellation of its franchise under this section during the time such suspension of operations is authorized. In determining whether such carrier has made reasonable efforts to perform service under said franchise the Commission may in its discretion give consideration to disabilities of the carrier including death of the owner and physical disabilities.

(d) This section shall be applicable to bus companies. (1947, c. 1008, s. 23; 1949, c. 1132, s. 21; 1963, c. 1165, s. 1; 1967, c. 1201; 1985, c. 676, s. 12; 1995, c. 523, s. 3.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, in subsection (c), in the first sentence deleted "or contract carrier" following "common carrier", substituted "household goods" for "property", and deleted "or that the needs of a contract shipper are no longer served by such a contract carrier" from the end of the sentence, in the first and second sentences deleted "or permit" following "certificate", deleted "or contract" following "such common" in the second sentence, and in the third sentence deleted "or to its contract shipper" following "to the public".

## § 62-113. Terms and conditions of franchises.

(a) Each franchise shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, a motor carrier or other public utility is authorized to operate: and there shall, at the time of issuance and from time to time thereafter, be attached to the privileges granted by the franchise such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of a carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of a carrier or other public utility, the requirements established by the Commission under this Chapter; provided, however, that no terms, conditions, or limitations shall restrict the right of a motor carrier of household goods only to add to its equipment and facilities over the routes, between the termini, or within the territory specified in the franchises, as the development of the business and the demands of the public shall require. This subsection shall not be applicable to bus companies or their franchises.

(b) Each bus company franchise shall specify the fixed routes over which, and the fixed termini, if any, between which the bus company may operate. A franchise for bus companies engaged in charter operations may provide for fixed routes or statewide operating authority. (1947, c. 1008, s. 12; 1949, c. 1132, s. 11; 1963, c. 1165, s. 1; 1985, c. 676, s. 13; 1995, c. 523, s. 4.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" near the end of the first sentence in subsection (a).

**§ 62-114:** Repealed by Session Laws 1995, c. 523, s. 5, effective July 29, 1995.

## § 62-118. Abandonment and reduction of service.

(a) Upon finding that public convenience and necessity are no longer served, or that there is no reasonable probability of a public utility realizing sufficient revenue from a service to meet its expenses, the Commission shall have power, after petition and notice, to authorize by order any public utility to abandon or reduce such service. Upon request from any party having an interest in said utility service, the Commission shall hold a public hearing on such petition, and may on its own motion hold a public hearing on such petition. Provided, however, that abandonment or reduction of service of motor carriers shall not be subject to this section, but shall be authorized only under the provisions of G.S. 62-262(k) and G.S. 62-262.2.

(b) If any person or corporation furnishing water or sewer utility service under this Chapter shall abandon such service without the prior consent of the Commission, and the Commission subsequently finds that such abandonment of service causes an emergency to exist, the Commission may, unless the owner or operator of the affected system consents, apply in accordance with G.S. 1A-1, Rule 65, to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 in which the person or corporation so operates, for an order restricting the lands, facilities and rights-of-way used in furnishing said water or sewer utility service to continued use in furnishing said service during the period of the emergency. An emergency is defined herein as the imminent danger of losing adequate water or sewer utility service or the actual loss thereof. The court shall have jurisdiction to restrict the lands, facilities, and rights-of-way to continued use in furnishing said water or sewer utility service by appropriate order restraining their being placed to other use, or restraining their being prevented from continued use in furnishing said water or sewer utility service, by any person, corporation, or their representatives. The court may, in its discretion, appoint an emergency operator to assure the continued operation of such water or sewer utility service. The court shall have jurisdiction to require that reasonable compensation be paid to the owner, operator or other party entitled thereto for the use of any lands, facilities, and rights-of-way which are so restricted to continued use for furnishing water or sewer utility service during the period of the emergency, and it may require the emergency operator of said lands, facilities, and rights-of-way to post bond in an amount required by the court. In no event shall such compensation, for each month awarded, exceed the net average monthly income of the utility for the 12-month period immediately preceding the order restricting use.

(c) Whenever the Commission, upon complaint or investigation upon its own motion, finds that the facilities being used to furnish water or sewer utility service are inadequate to such an extent that an emergency (as defined in G.S. 62-118(b) above) exists, and further finds that there is no reasonable probability of the owner or operator of such utility obtaining the capital necessary to improve or replace the facilities from sources other than the customers, the Commission shall have the power, after notice and hearing, to authorize by order that such service be abandoned or reduced to those customers who are unwilling or unable to advance their fair share of the capital necessary for such improvements. The amount of capital to be advanced by each customer shall be subject to approval by the Commission, and shall be advanced under such conditions as will enable each customer to retain a proprietary interest in the system to the extent of the capital so advanced. The remedy prescribed in this subsection is in addition to other remedies prescribed by law. (1933, c. 307, s. 32; 1963, c. 1165, s. 1; 1971, c. 552, s. 1; 1973, c. 1393; 1985, c. 676, s. 14; 1987 (Reg. Sess., 1988), c. 1037, s. 93; 1989 (Reg. Sess., 1990), c. 1024, s. 15.)

## ARTICLE 6A.

## *Radio Common Carriers.*

**§§ 62-119 through 62-125:** Repealed by Session Laws 1995, c. 523, s. 31, effective July 29, 1995.

**§§ 62-126 through 62-129:** Reserved for future codification purposes.

## ARTICLE 7.

## *Rates of Public Utilities.*

### § 62-130. Commission to make rates for public utilities.

**Editor's Note.** — Session Laws 1991, c. 240, provides: "Section 1. The State Utilities Commission shall authorize one or more telephone companies, including at least one of the two largest companies operating in the State, to conduct a pilot program within the State in accordance with this act. The program shall be conducted individually by each of the telephone companies participating in the program, and shall be designed to evaluate the cost-effectiveness, public benefit, and feasibility of implementing a limitation on the duration of local telephone calls placed at coin-operated and coinless public telephones. Participating companies shall alter a certain number of coin-operating and coinless public telephones in one of the following manners: a) so that the telephones automatically terminate the connection on a local call after a period of between seven and ten minutes; or b) so that the telephones time local calls in predetermined increments with a local charge applied to each increment. The number of telephones to be altered, the number of minutes after which the cut-off occurs, and the increments of time shall be determined by the participating companies. The number of telephones to be altered shall be determined by identifying the number necessary to reliably evaluate the cost-effectiveness and usefulness of the program. Participating telephone companies shall provide to the Utilities Commission upon request all information necessary to evaluate the program.

"Sec. 2. The length of the pilot program provided for in Section 1 of this act shall be at least six months but no longer than one year and shall be completed no later than December 31, 1992.

"Sec. 3. The State Utilities Commission shall report the results and conclusions from the program to the Joint Legislative Utility Review Committee within three months of the completion of the pilot program, but not later than March 1, 1993."

CASE NOTES

**Applied** in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

## § 62-131. Rates must be just and reasonable; service efficient.

CASE NOTES

**Applied** in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

## § 62-132. Rates established under this Chapter deemed just and reasonable; remedy for collection of unjust or unreasonable rates.

CASE NOTES

**"Established" rates, unlike "permitted" or "allowed" rates,** are determined by the Commission after a full hearing, findings, conclusions and a formal order. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

**Appropriate Claims for Relief May Exist Under §§ 62-139 and 62-140.** — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under § 62-140 which prohibits unreasonable discrimination by public utilities, or under § 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

**Applied** in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

## § 62-133. How rates fixed.

(a) In fixing the rates for any public utility subject to the provisions of this Chapter, other than bus companies, motor carriers and certain water and sewer utilities, the Commission shall fix such rates as shall be fair both to the public utilities and to the consumer.

(b) In fixing such rates, the Commission shall:

(1) Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection may be included, to the extent the Commission considers such inclusion in

the public interest and necessary to the financial stability of the utility in question, subject to the provisions of subparagraph (b)(4a) of this section.

(1a) Apply the rate of return established under subdivision (4) of this subsection to rights-of-way acquired through agreements with the Department of Transportation pursuant to G.S. 136-19.5(a) if acquisition is consistent with a definite plan to provide service within five years of the date of the agreement and if such right-of-way acquisition will result in benefits to the ratepayers. If a right-of-way is not used within a reasonable time after the expiration of the five-year period, it may be removed from the rate base by the Commission when rates for the public utility are next established under this section.

(2) Estimate such public utility's revenue under the present and proposed rates.

(3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation.

(4) Fix such rate of return on the cost of the property ascertained pursuant to subdivision (1) as will enable the public utility by sound management to produce a fair return for its shareholders, considering changing economic conditions and other factors, as they then exist, to maintain its facilities and services in accordance with the reasonable requirements of its customers in the territory covered by its franchise, and to compete in the market for capital funds on terms which are reasonable and which are fair to its customers and to its existing investors.

(4a) Require each public utility to discontinue capitalization of the composite carrying cost of capital funds used to finance construction (allowance for funds) on the construction work in progress included in its rate based upon the effective date of the first and each subsequent general rate order issued with respect to it after the effective date of this subsection; allowance for funds may be capitalized with respect to expenditures for construction work in progress not included in the utility's property upon which the rates were fixed. In determining net operating income for return, the Commission shall not include any capitalized allowance for funds used during construction on the construction work in progress included in the utility's rate base.

(5) Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivisions (1) and (1a) of this subsection.

(c) The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

(d) The Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates.

(e) The fixing of a rate of return shall not bar the fixing of a different rate of return in a subsequent proceeding.

(f) Repealed by Session Laws 1991, c. 598, s. 7, effective July 8, 1991.

(g) Reserved.

(h) The Commission is not authorized to entertain applications filed on behalf of intrastate rail carriers to fix rates for a single commodity or to fix rates for groups of commodities which constitute less than a general rate increase. (1899, c. 164, s. 2, subsec. 1; Rev., s. 1104; C.S., s. 1068; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1971, c. 1092; 1973, c. 956, s. 1; c. 1041, s. 1; 1975, c. 184, s. 2; 1977, c. 691, ss. 2, 3; 1981, c. 476; 1981 (Reg. Sess., 1982), c. 1197, s. 6; 1985, c. 676, s. 15(2); 1989 (Reg. Sess., 1990), c. 962, s. 4; 1991, c. 598, s. 7.)

**Editor's Note. —** Session Laws 1991, c. 598, s. 7, which repealed subsection (f), provides that its repeal shall not affect the right of any natural gas local distribution company to recover any costs previously approved by the Commission.

Section 11 of Session Laws 1991, c. 598 provides that the enactment of ss. 7 and 8 of c. 598 "shall not have any effect on any matter presently before any court."

## CASE NOTES

I. In General.
II. Powers and Duties of Utilities Commission, Generally.
III. Fixing of Rates, Generally.
IV. Rate Base.
  A. In General.
V. Operating Expenses and Working Capital.
VI. Rate of Return.
VII. Test Period.

### I. IN GENERAL.

**Commerce Clause Not Violated. —** The North Carolina Utilities Commission is authorized by Congress to act with regard to arrangements between cogenerators and power company, so that the commission's disallowance of the amount by which contracts exceeded the company's avoided costs was consistent with federal laws and regulations and constituted lawful retail ratemaking. The commission's actions did not violate the Commerce Clause. State ex rel. Utils. Comm'n v. North Carolina Power, 338 N.C. 412, 450 S.E.2d 896 (1994), rehearing denied, 339 N.C. 743, 454 S.E.2d 269 (1995), cert. denied, — U.S. —, 116 S. Ct. 813, 133 L. Ed. 2d 758 (1996).

**Applied** in State ex rel. Utils. Comm'n v. Public Staff, 331 N.C. 215, 415 S.E.2d 354 (1992); State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 491, 417 S.E.2d 75 (1992).

## II. POWERS AND DUTIES OF UTILITIES COMMISSION, GENERALLY.

**Commission's Rate Making Powers Not Governed by Principles of Res Judicata.** — Since the exercise of the Commission's rate making power is a legislative rather than a judicial function, such orders are not governed by the principles of res judicata, and are reviewable in later appeals of closely related matters. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

Attorney General's appeal from Utilities Commission order was not barred by the doctrine of res judicata, where the prior Commission rulings relied on by appellee power company as a bar to appellant's position were all designated by the Commission as "general rate cases" in which appellee sought Commission authority to increase its electric rates and charges, and where in fixing the rates to be charged by the utility, the Commission was exercising a function delegated to it by the legislative branch of the government. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

**Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure.** — Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

**When Commission's Orders Affirmed.** —

In accord with the main volume. See State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

**Error to Accept Design Criteria of Division of Environmental Management.** — It was error for the Utilities Commission to arbitrarily or subserviently accept, in place of its own determination upon the evidence before it, design criteria of the Division of Environmental Management as the actual plant capacity currently needed for service to existing customers—and the beginning point for determining the appropriate additional "capacity allowance" in the rate base of plant which was not presently in service to the public, but was held for future use. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

## III. FIXING OF RATES, GENERALLY.

**The "reasonable operating expenses,"** specified in subdivisions (b)(3) and (5) of this section, relate and must be directly connected to "the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period," as specified in subsection (b)(1). State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

**Burden of Proof.** — The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

**Additions for Used and Useful Plant.** — Subsection (c) of this section only requires the Utilities Commission to consider post-test period changes in used and useful plant. It also requires the Commission to consider changes in costs and revenues. If the evidence does not show what changes there may be in matching costs and revenues, the Commission does not have to allow additions to the rate base for a used and useful plant. State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991).

**Fundamental Changes in Sources and Supply.** — Where filings reflected decisions by natural gas company's management to make fundamental changes in its sources of supply of natural gas and to access substantial additional volumes of natural gas, the rate changes generated by these decisions were not of the nature of those to be allowed under former subsection (f) of this section but rather had to be considered and passed upon in a general rate case proceeding pursuant to subsections (a)-(e) of this section. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 106 N.C. App. 218, 415 S.E.2d 758 (1992), cert. denied, 332 N.C. 671, 424 S.E.2d 417 (1992).

**The North Carolina Utilities Commission reviewed the capacity rate set by an arbitrator** and determined that he did not properly take into account other potential sources of power, thus his assessment of avoided costs was unreasonably high, and its exclusion of expenses for capacity payments was merely the disallowance of the amount by which the contract rate exceeded power company's avoided costs; therefore the commission properly disallowed expenses for unreasonably high payments in accordance with this section. State ex rel. Utils. Comm'n v. North Carolina Power, 338 N.C. 412, 450 S.E.2d 896 (1994), rehearing denied, 339 N.C. 743, 454 S.E.2d 269 (1995), cert. denied, — U.S. —, 116 S. Ct. 813, 133 L. Ed. 2d 758 (1996).

**Evidence Not Sufficient.** — Because of the lack of evidence justifying increase and because the Commission did not consider the future revenue potential, the decision of the Commission was not supported by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc., 335 N.C. 493, 439 S.E.2d 127 (1994).

## IV. RATE BASE.

### A. In General.

**Matching Revenues and Costs Required for Use of Post-Test Year Costs in Rate Base.** — Where provider of water and sewer services asks that costs for post-test year use of plants be included in its rate base, the Utilities Commission may, under subsection (c) of this section, require the utility to show matching revenues and costs. State ex rel. Utils. Comm'n v. Water Serv., Inc., 328 N.C. 299, 401 S.E.2d 353 (1991).

**"Excess" Facilities Not "Used and Useful."** — If facilities are found to be excess, as a matter of law, they can not be considered "used and useful" as that term is used in subdivision (b)(1), and cannot be included in the rate base. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

**Classification as "Extraordinary Property Retirement" Held Error.** — The classification of a physical plant that is not "used and useful" (and thus not includable in a rate base) as "extraordinary property retirement" and subject to recovery through amortization, has no legal basis. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

Where, after finding a sewer connection to be "no longer used and useful" and erroneously concluding thereupon that it should be treated as extraordinary property retirement and amortized over a six-year period, the Utilities Commission directed the "unamortized balance" to be "included in rate base", the Commission simultaneously treated the unused property as rate base and reasonable operating expenses in direct violation of the ratemaking process. State ex rel. Utils. Comm'n v. Public Staff — North Carolina Utils. Comm'n, 333 N.C. 195, 424 S.E.2d 133 (1993).

## V. OPERATING EXPENSES AND WORKING CAPITAL.

**Cancellation Costs as Operating Expense.** — There was no error in the Commission's authorization for utility to amortize costs associated with abandoned construction of nuclear power plant as operating expenses for rate making purposes; this action was within the commission's power and supported by competent, material, and substantial evidence. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

**Costs Held to Be Cancellation Costs.** — Costs of the additional burden assured by one unit at nuclear power plant in anticipation of reducing the costs of the remaining three units, which were later cancelled, should have been treated as cancellation costs of the abandoned units, to be recovered as operating expenses through amortization. State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 484, 385 S.E.2d 463 (1989).

## VI. RATE OF RETURN.

**Rate of Return Defined.** — The overall rate of return is a percentage which the Commission concludes the utility should be permitted to earn on its rate base, which is the cost of the utility's property used and useful in providing service to the public. The rate of return percentage is calculated by subtracting from the utility's revenues its cost of service and dividing the difference by the rate base. State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

## VII. TEST PERIOD.

**The plain language of subsection (c)** merely provides that the components of the rate making formula are to be determined based on an historical test period, and do not require a nexus between operating expenses and "property used and useful." The statute reserves this requirement solely to the reasonable original cost of the public utility's property, the ratebase component which is described in subdivision (b)(1). State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989).

### § 62-133.2. Fuel charge adjustments for electric utilities.

(a) The Commission may allow electric utilities to charge a uniform increment or decrement as a rider to their rates for changes in the cost of fuel and the fuel component of purchased power used in providing their North Carolina customers with electricity from the cost of fuel and the fuel component of purchased power established in their previous general rate case.

(b) For each electric utility engaged in the generation and production of electric power by fossil or nuclear fuels, the Commission shall hold a hearing within 12 months of the last general rate case order and determine whether an increment or decrement rider is required to reflect actual changes in the cost of fuel and the fuel cost component of purchased power over or under base rates established in the last preceding general rate case. Additional hearings shall be held on an annual basis but only one hearing for each such electric utility may be held within 12 months of the last general rate case.

(c) Each electric utility shall submit to the Commission for the hearing verified annualized information and data in such form and detail as the Commission may require, for an historic 12-month test period, relating to:

(1) Purchased cost of fuel used in each generating facility owned in whole or in part by the utility.
(2) Fuel procurement practices and fuel inventories for each facility.
(3) Burned cost of fuel used in each generating facility.
(4) Plant capacity factor for each generating facility.
(5) Plant availability factor for each generating plant.
(6) Generation mix by types of fuel used.
(7) Sources and fuel cost component of purchased power used.
(8) Recipients of and revenues received for power sales and times of power sales.
(9) Test period kilowatt hour sales for the utility's total system and on the total system separated for North Carolina jurisdictional sales.

(d) The Commission shall provide for notice of a public hearing with reasonable and adequate time for investigation and for all intervenors to prepare for hearing. At the hearing the Commission shall receive evidence from the utility, the public staff, and any intervenor desiring to submit evidence, and from the public generally. In reaching its decision, the Commission shall consider all evidence required under subsection (c) of this section as well as any and all other competent evidence that may assist the Commission in reaching its decision including changes in the price of fuel consumed and changes in the price of the fuel in the fuel component of purchased power occurring within a reasonable time (as determined by the Commission) after the test period is closed. The Commission shall incorporate in its fuel cost determination under this subsection the experienced over-recovery or under-recovery of reasonable fuel expenses prudently incurred during the test period, based upon the prudent standards set pursuant to subsection (d1) of this section, in fixing an increment or decrement rider. The Commission shall use deferral accounting, and consecutive test periods, in complying with this subsection, and the over-recovery or under-recovery portion of the increment or decrement shall be reflected in rates for 12 months, notwithstanding any changes in the base fuel cost in a general rate case. The burden of proof as to the correctness and reasonableness of the charge and as to whether the fuel charges were reasonably and prudently incurred shall be on the utility. The Commission shall allow only that portion, if any, of a requested fuel adjustment that is based on adjusted and reasonable fuel expenses prudently incurred under efficient management and economic operations. In evaluating whether fuel expenses were reasonable and prudently incurred, the Commission shall apply the rule adopted pursuant to subsection (d1). To the extent that the Commission determines that an increment or decrement to the rates of the utility due to changes in the cost of fuel and the fuel cost component of purchased power over or under base fuel costs established in the preceding general rate case is just and reasonable, the Commission shall order that the increment or decrement become effective for all sales of electricity and remain in effect until changed in a subsequent general rate case or annual proceeding under this section.

(d1) Within one year after ratification of this act, for the purposes of setting fuel rates, the Commission shall adopt a rule that establishes prudent standards and procedures with which it can appropriately measure management efficiency in minimizing fuel costs.

(e) If the Commission has not issued an order pursuant to this section within 120 days of a utility's submission of annual data under subsection (c) of this section, the utility may place the requested fuel adjustment into effect. If the change in rate is finally determined to be excessive, the utility shall make refund of any excess plus interest to its customers in a manner ordered by the Commission.

(f) Nothing in this section shall relieve the Commission from its duty to consider the reasonableness of fuel expenses in a general rate case and to set rates reflecting reasonable fuel expenses pursuant to G.S. 62-133.

(g) On July 1, 1993 and every two years thereafter, the Utilities Commission shall provide a report to the Joint Legislative Utility Review Committee summarizing the procedures conducted pursuant to G.S. 62-133.2 during the preceding two years. (1981 (Reg. Sess., 1982), c. 1197, s. 1; 1987, c. 677, s. 1; 1995, c. 15, ss. 1, 2.)

**Editor's Note.** —

Session Laws 1991, c. 129, s. 1, effective May 27, 1991, repealed Session Laws 1987, c. 677, s. 5, as amended by Session Laws 1989, c. 15, s. 1, which had provided for repeal of this section effective July 1, 1991.

Session Laws 1995, c. 15, s. 1, effective March 22, 1995, repealed Session Laws 1991, c. 129, s. 2, which had provided for the repeal of this section effective July 1, 1997.

Session Laws 1995, c. 15, s. 2 was codified as subsection (g) of this section at the direction of the Revisor of Statutes.

**§ 62-133.3:** Repealed by Session Laws 1995, c. 27, s. 5, effective July 1, 1995.

## § 62-133.4. Gas cost adjustment for natural gas local distribution companies.

(a) Rate changes for natural gas local distribution companies occasioned by changes in the cost of natural gas supply and transportation may be determined under this section rather than under G.S. 62-133(b), (c), or (d).

(b) From time to time, as changes in the cost of natural gas require, each natural gas local distribution company may apply to the Commission for permission to change its rates to track changes in the cost of natural gas supply and transportation. The Commission may, without a hearing, issue an order allowing such rate changes to become effective simultaneously with the effective date of the change in the cost of natural gas or at any other time ordered by the Commission. If the Commission has not issued an order under this subsection within 120 days after the application, the utility may place the requested rate adjustment into effect. If the rate adjustment is finally determined to be excessive or is denied, the utility shall make refund of any excess, plus interest as provided in G.S. 62-130(e), to its customers in a manner ordered by the Commission. Any rate adjustment under this subsection is subject to review under subsection (c) of this section.

(c) Each natural gas local distribution company shall submit to the Commission information and data for an historical 12-month test period concerning the utility's actual cost of gas, volumes of purchased gas, sales volumes, negotiated sales volumes, and transportation volumes. This information and data shall be filed on an annual basis in the form and detail and at the time required by the Commission. The Commission, upon notice and hearing, shall compare the utility's prudently incurred costs with costs recovered from all the utility's customers that it served during the test period. If those prudently incurred costs are greater or less than the recovered costs, the Commission shall, subject to G.S. 62-158, require the utility to refund any overrecovery by credit to bill or through a decrement in its rates and shall permit the utility to recover any deficiency through an increment in its rates.

(d) Nothing in this section prohibits the Commission from investigating and changing unreasonable rates as authorized by this Chapter, nor does it prohibit the Commission from disallowing the recovery of any gas costs not prudently incurred by a utility.

(e) As used in this section, the word "cost" or "costs" shall be defined by Commission rule or order and may include all costs related to the purchase and transportation of natural gas to the natural gas local distribution company's system. (1991, c. 598, s. 8.)

**Editor's Note.** — Session Laws 1991, c. 598, s. 11, made this section effective upon ratification. The act was ratified July 8, 1991.

Section 11 of Session Laws 1991, c. 598 further provides that the enactment of ss. 7 and 8 of c. 598 "shall not have any effect on any matter presently before any court."

### § 62-133.5. Alternative regulation, tariffing, and deregulation of telecommunications utilities.

(a) Any local exchange company, subject to the provisions of G.S. 62-110(f1), that is subject to rate of return regulation pursuant to G.S. 62-133 or a form of alternative regulation authorized by subsection (b) of this section may elect to have the rates, terms, and conditions of its services determined pursuant to a form of price regulation, rather than rate of return or other form of earnings regulation. Under this form of price regulation, the Commission shall, among other things, permit the local exchange company to determine and set its own depreciation rates, to rebalance its rates, and to adjust its prices in the aggregate, or to adjust its prices for various aggregated categories of services, based upon changes in generally accepted indices of prices. Upon application, the Commission shall, after notice and an opportunity for interested parties to be heard, approve such price regulation, which may differ between local exchange companies, upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards that the Commission may adopt; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. Upon approval, and except as provided in subsection (c) of this section, price regulation shall thereafter be the sole form of regulation imposed upon the electing local exchange company, and the Commission shall thenceforth regulate the electing local exchange company's prices, rather than its earnings. The Commission shall issue an order denying or approving the proposed plan for price regulation, with or without modification, not more than 90 days from the filing of the application. However, the Commission may extend the time period for an additional 90 days at the discretion of the Commission. If the Commission approves the application with modifications, the local exchange company subject to such approval may accept the modifications and implement the proposed plan as modified, or may, at its option, (i) withdraw its application and continue to be regulated under the form of regulation that existed immediately prior to the filing of the application; (ii) file another proposed plan for price regulation; or (iii) file an application for a form of alternative regulation under subsection (b) of this section. If the initial price regulation plan is approved with modifications and the local exchange company files another plan pursuant to part (ii) of the previous sentence, the Commission shall issue an order denying or approving the proposed plan for price regulation, with or without modifications, not more than 90 days from that filing by the local exchange company.

(b) Any local exchange company that is subject to rate of return regulation pursuant to G.S. 62-133 and which elects not to file for price regulation under the provisions of subsection (a) above may file an application with the Commission for forms of alternative regulation, which may differ between companies and may include, but are not limited to, ranges of authorized returns, categories of services, and price indexing. Upon application, the Commission shall approve such alternative regulatory plan upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards established by the Commission; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest. The Commission shall issue an order denying or approving the proposed plan with or without modification, not more than 90 days from the filing of the application. However, the Commission may extend the time period for an additional 90 days at the discretion of the Commission. If the Commission approves the application with modifications, the local exchange company subject to such approval may, at its option, accept the modifications and implement the proposed plan as modified or may, at its option, (i) withdraw its application and continue to be regulated under the form of regulation that existed at the time of filing the application; or (ii) file an application for another form of alternative regulation. If the initial plan is approved with modifications and the local exchange company files another plan pursuant to part (ii) of the previous sentence, the Commission shall issue an order denying or approving the proposed plan, with or without modifications, not more than 90 days from that filing by the local exchange company.

(c) Any local exchange company subject to price regulation under the provisions of subsection (a) of this section may file an application with the Commission to modify such form of price regulation or for other forms of regulation. Any local exchange company subject to a form of alternative regulation under subsection (b) of this section may file an application with the Commission to modify such form of alternative regulation. Upon application, the Commission shall approve such other form of regulation upon finding that the plan as proposed (i) protects the affordability of basic local exchange service, as such service is defined by the Commission; (ii) reasonably assures the continuation of basic local exchange service that meets reasonable service standards established by the Commission; (iii) will not unreasonably prejudice any class of telephone customers, including telecommunications companies; and (iv) is otherwise consistent with the public interest.

(d) Any local exchange company subject to price regulation under the provisions of subsection (a) of this section, or other alternative regulation under subsection (b) of this section, or other form of regulation under subsection (c) of this section shall file tariffs for basic local exchange service and toll switched access services stating the terms and conditions of the services and the applicable rates. The filing of any tariff changing the terms and conditions of such services or increasing the rates for such services shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, 14 days after filing. Any tariff reducing rates for basic local exchange service or toll switched access service shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, seven days after filing. Any local exchange company subject to price regulation under the provisions of subsection (a) of this section, or other alternative regulation under subsection (b) of this section, or other form of regulation under subsection (c) of this section may file tariffs for services other than basic local exchange services and toll switched access services. Any tariff changing the terms and conditions of such services or increasing the rates for an existing service or establishing the terms, conditions, or rates for a new service shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, 14 days after filing. Any tariff reducing the rates for such services shall be presumed valid and shall become effective, unless otherwise suspended by the Commission for a term not to exceed 45 days, seven days after filing. In the event of a complaint with regard to a tariff filing under this subsection, the Commission may take such steps as it deems appropriate to assure that such tariff filing is consistent with the plan previously adopted pursuant to subsection (a) of this section, subsection (b) of this section, or subsection (c) of this section.

(e) Any allegation of anticompetitive activity by a competing local provider or a local exchange company shall be raised in a complaint proceeding pursuant to G.S. 62-73.

(f) Notwithstanding the provisions of G.S. 62-140, the Commission shall permit a local exchange company or a competing local provider to offer competitive services with flexible pricing arrangements to business customers pursuant to contract and shall permit other flexible pricing options.

(g) The following sections of Chapter 62 of the General Statutes shall not apply to local exchange companies subject to price regulation under the terms of subsection (a) of this section: G.S. 62-35(c), 62-45, 62-51, 62-81, 62-111, 62-130, 62-131, 62-132, 62-133, 62-134, 62-135, 62-136, 62-137, 62-139, 62-142, and 62-153. (1995, c. 27, s. 6.)

**Editor's Note.** — Session Laws 1995, c. 27, s. 6, made this section effective July 1, 1995.

Session Laws 1995, c. 27, s. 6.1, effective July 1, 1995, provides that beginning on October 1, 1997, and every two years thereafter, the utilities Commission and the Public Staff shall each provide a report to the Joint Legislative Utility Review Committee that summarizes procedures conducted pursuant to this act during the preceding two years.

## § 62-134. Change of rates; notice; suspension and investigation.

### CASE NOTES

I. In General.

### I. IN GENERAL.

**Cited** in State ex rel. Utils. Comm'n v. Empire Power Co., 112 N.C. App. 265, 435 S.E.2d 553 (1993).

## § 62-136. Investigation of existing rates; changing unreasonable rates; certain refunds to be distributed to customers.

CASE NOTES

**Tax Reform Benefits Passed on to Ratepayers by Rulemaking Rather Than Ratemaking Procedure. —** Utilities Commission may pass on to the ratepayers the benefits of the Tax Reform Act of 1986 (TRA-86) through a rulemaking procedure rather than a ratemaking procedure. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

**Subsection (c) speaks in terms of when the refund is received by the utilities, etc. —** Refunds to the local distribution company come under the supervision of the Commission until such time as it makes a determination with regard to the disposition of the refunds, pursuant to subsection (c), creating rights on behalf of the customers, and until that time, the utilities customers have no vested interest in the refunds. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

## § 62-137. Scope of rate case.

CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Thornburg, 325 N.C. 463, 385 S.E.2d 451 (1989); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 326 N.C. 190, 388 S.E.2d 118 (1990).

## § 62-138. Utilities to file rates, service regulations and service contracts with Commission; publication; certain telephone service prohibited.

(a) Under such rules as the Commission may prescribe, every public utility, except as permitted under G.S. 62-134(h) and (j):

(1) Shall file with the Commission all schedules of rates, service regulations and forms of service contracts, used or to be used within the jurisdiction of the Commission; and

(2) Shall keep copies of such schedules, service regulations and contracts open to public inspection. Except, if there is a sufficient likelihood that a public utility defined in G.S. 62-3(23)a.6. may suffer a competitive disadvantage if the rates for a specific competitive service are disclosed, the Commission may waive the public disclosure of the rates. The Commission may revoke the disclosure waiver upon a showing that the competitive disadvantage no longer exists.

(b) Every common carrier of passengers shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of passengers in intrastate commerce and all services in connection therewith between points on its own routes and between points on its own routes and points on the routes of other such common carriers, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates.

(c) Every irregular route common carrier of household goods shall file with the Commission, print, and keep open for public inspection schedules showing all rates for the transportation of household goods in intrastate commerce between points within the area of its authorized operation, and if it establishes joint rates with other common carriers, it shall include in its schedules so filed such joint rates between points within the area of its own authorized operation and points on the line or route of such other common carriers.

(c1) Any person who, though exempt from Commission regulation under Public Law 103-305, agrees to joint line rates or routes as authorized by Public Law 103-305 may file with the Commission, print, and keep open for public inspection schedules showing all such joint rates for the transportation of property in intrastate commerce, and all connected services, between all points the person serves.

(d) The schedules required by this section shall be published, filed, and posted in such form and manner and shall contain such information as the Commission may prescribe; and the Commission is authorized to reject any schedule filed with it which is not in compliance with this section. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) No public utility, unless otherwise provided by this Chapter, shall engage in service to the public unless its rates for such service have been filed and published in accordance with the provisions of this section.

(f) Under such rules as the Commission may prescribe, every electric membership corporation operating within this State shall file with the Commission, for information purposes, all rates, schedules of rates, charges, service regulations, and forms of service contracts, used or to be used within the State, and shall keep copies of such schedules, rates, charges, service regulations, and contracts open to public inspection.

(g) No public utility may offer or maintain telephone service to any subscriber to such service who has in use or proposes to place in use equipment which will enable said subscriber to observe or monitor telephone calls directed to or placed by said subscriber unless said subscriber shall agree that such equipment shall be used in conformity with the standards for the use of such equipment adopted by the Commission. (1899, c. 164, s. 7; Rev., s. 1109; 1907, c. 217, s. 5; C.S., s. 1074; 1933, c. 134, s. 8; c. 307, s. 4; 1941, c. 97; 1947, c. 1008, s. 25; 1949, c. 1132, s. 23; 1959, c. 209; 1963, c. 1165, s. 1; 1965, c. 287, s. 7; 1977, c. 799; 1989, c. 112, s. 5; 1995, c. 523, s. 6.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, in subsection (b) deleted "regular route common carrier of general commodities and every" following "Every" in the first sentence; in subsection (c) inserted "of household goods" following "common carrier" and substituted the second occurrence of "household goods" for "property"; and added subsection (c1).

## CASE NOTES

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

## § 62-139. Rates varying from schedule prohibited; refunding overcharge; penalty.

### CASE NOTES

**Claim for Relief Where Disputed Rates "Established" May Exist Under Section.** — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under § 62-140 which prohibits unreasonable discrimination by public utilities, or under this section which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

**Stated** in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

## § 62-140. Discrimination prohibited.

### CASE NOTES

I. In General.

### I. IN GENERAL.

**Claim for Relief Where Disputed Rates "Established" May Exist Under Section.** — An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under this section which prohibits unreasonable discrimination by public utilities, or under § 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. Blue Ridge Textile Printers, Inc. v. Public Serv. Co., 99 N.C. App. 193, 392 S.E.2d 401 (1990).

**Applied** in State ex rel. Util. Comm'n v. Carolina Util. Customers Ass'n, 328 N.C. 37, 399 S.E.2d 98 (1991).

**Stated** in Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990).

**Cited** in State ex rel. Utils. Comm'n v. Mountain Elec. Coop., 108 N.C. App. 283, 423 S.E.2d 516 (1992).

## § 62-141. Long and short hauls.

(a) Except when expressly permitted by the Commission, it shall be unlawful for any common carrier to charge or receive any greater compensation in the aggregate for the transportation of like kind of household goods under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Chapter to charge and receive as great compensation for a shorter as for a longer distance.

(b) Upon application to the Commission, common carriers may in special cases be authorized to charge less for longer than for shorter distances for the transportation of household goods; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section.

(c) The provisions of this section shall not be applicable to bus companies or to their rates, charges or tariffs. (1899, c. 164, s. 14; Rev., s. 1107; Ex. Sess. 1913, c. 20, s. 9; 1915, c. 17, s. 1; C.S., s. 1072; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1985, c. 676, s. 15(4); 1995, c. 523, s. 7.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in subsections (a) and (b).

## § 62-144. Free transportation.

(a) All common carriers under the supervision of the Commission shall furnish free transportation to the members of the Commission, and, upon written authority of the Commission, such carriers shall also furnish free transportation to such persons as the Commission may designate in its employ or in the employ of the Department of Motor Vehicles for the inspection of equipment and supervision of safe operating conditions and of traffic upon the highways of the State.

(b) Except as provided in subsection (a), no common carrier shall, directly or indirectly, issue, give, tender, or honor any free fares except to its bona fide officers, agents, commission agents, employees and retired employees, and members of their immediate families: Provided, that common carriers under this Article may exchange free transportation within the limits of this section and may accept as a passenger a totally blind person accompanied by a guide at the usual and ordinary fare charged to one person under such reasonable regulations as may have been established by the carrier and approved by the Commission.

(c) Any person except those permitted by law accepting free transportation shall be guilty of a Class 1 misdemeanor.

(d) Nothing in this section shall prohibit the carriage, storage or handling of household goods free or at reduced rates for the United States, State or municipal governments, or for charitable or educational purposes, or the use of passes for journeys wholly within this State which have been or may be issued for interstate journeys under the authority of the United States Interstate Commerce Commission. (1899, c. 164, s. 22; c. 642; 1901, c. 652; c. 679, s. 2; 1905, c. 312; Rev., s. 1105; Ex. Sess. 1908, c. 144, s. 4; 1911, cc. 49, 148; 1913, c. 100; 1915, c. 215; 1917, cc. 56, 160; C.S., ss. 1069, 1070, 3492; 1933, c. 134, s. 8; 1941, c. 97; 1949, c. 1132, s. 27; 1953, c. 1279; 1963, c. 1165, s. 1; 1993, c. 539, s. 477; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 523, s. 8.)

**Editor's Note.** — Session Laws 1993, c. 539, s. 477, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in subsection (d).

## § 62-146. Rates and service of motor common carriers of property.

(a) It shall be the duty of every common carrier of household goods by motor vehicle to provide safe and adequate service, equipment, and facilities for transportation in intrastate commerce and to establish, observe and enforce just and reasonable regulations and practices relating thereto, and, in the case of household goods carriers, relating to the manner and method of presenting, marking, packing and delivering property for transportation in intrastate commerce.

(b) Except under special conditions and for good cause shown, a common carrier by motor vehicle authorized to transport general commodities over regular routes shall establish reasonable through routes and joint rates, charges, and classifications with other such common carriers by motor vehicle; and such common carrier may establish, with the prior approval of the Commission, such routes, joint rates, charges and classifications with any irregular route common carrier by motor vehicle, or any common carrier by rail, express, or water.

(c) Repealed by Session Laws 1985, c. 676, s. 15, effective July 10, 1985.

(d) In case of joint rates between common carriers of property, it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein, which shall not unduly prefer or prejudice any of such participating carriers. Upon investigation and for good cause, the Commission may, in its discretion, prohibit the establishment of joint rates or service.

(e) Any person may make complaint in writing to the Commission that any rate, classification, rule, regulations, or practice in effect or proposed to be put into effect, is or will be in violation of this Article. Whenever, after hearing, upon complaint or in an investigation or its own initiative, the Commission shall be of the opinion that any individual or joint rate demanded, charged, or collected by any common carrier or carriers by motor vehicle, or by any such common carrier or carriers in conjunction with any other common carrier or carriers, for transportation of household goods in intrastate commerce, or any classification, rule, regulation, or practice whatsoever of such carrier or carriers affecting such rate or the value of the service thereunder, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or unduly prejudicial, it shall determine and prescribe the lawful rate or the minimum or maximum, or the minimum and maximum rate thereafter to be observed, or the lawful classification, rule, regulation, or practice thereafter to be made effective.

(f) Whenever, after hearing upon complaint or upon its own initiative, the Commission is of the opinion that the divisions of joint rates applicable to the transportation of household goods in intrastate commerce between a common carrier by motor vehicle and another carrier are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers; and in cases where the joint rate or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable or unduly preferential or prejudicial, the Commission may also by order determine what would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers and require adjustment to be made in accordance therewith. The order of the Commission may require the adjustment of divisions between the carriers in accordance with the order from the date of filing the complaint or entry of order of investigation or such other dates subsequent thereto as the Commission finds justified, and in the case of joint rates prescribed by the Commission, the order as to divisions may be made effective as a part of the original order.

(g) In any proceeding to determine the justness or reasonableness of any rate of any common carrier of household goods by motor vehicle, there shall not be taken into consideration or allowed as evidence any elements of value of the property of such carrier, good will, earning power, or the certificate under which such carrier is operating, and such rates shall be fixed and approved, subject to the provisions of subsection (h) hereof, on the basis of the operating ratios of such carriers, being the ratio of their operating expenses to their operating revenues, at a ratio to be determined by the Commission; and in applying for and receiving a certificate under this Chapter any such carrier shall be deemed to have agreed to the provisions of this paragraph, on its own behalf and on behalf of every transferee of such certificate or of any part thereof.

(h) In the exercise of its power to prescribe just and reasonable rates and charges for the transportation of household goods in intrastate commerce by common carriers by motor vehicle, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon movement of traffic by the carrier or carriers for which rates are prescribed; to the need in the public interest of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers under honest, economical, and efficient management to provide such service.

(i) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. This section shall be in addition to other provisions of this Chapter which relate to public utilities generally, except that in cases of conflict between such other provisions and this section, this section shall prevail for motor carriers. (1947, c. 1008, s. 23; 1949, c. 1132, s. 22; 1963, c. 1165, s. 1; 1985, c. 676, s. 15(5); 1995, c. 523, s. 9.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" throughout the section.

**§ 62-147:** Repealed by Session Laws 1995, c. 523, s. 10, effective July 29, 1995.

## § 62-150. Ticket may be refused intoxicated person; penalty for prohibited entry.

The ticket agent of any common carrier of passengers shall at all times have power to refuse to sell a ticket to any person applying for the same who may at the time be intoxicated. The conductor, driver or other person in charge of any conveyance for the use of the traveling public shall at all times have power to prevent any intoxicated person from entering such conveyance. If any intoxicated person, after being forbidden by the conductor, driver or other person having charge of any such conveyance for the use of the traveling public, shall enter such conveyance, he shall be guilty of a

Class 1 misdemeanor. (1885, c. 358, ss. 1, 2, 3; Rev., ss. 2625, 2626, 3757; C.S., s. 3504; 1963, c. 1165, s. 1; 1993, c. 539, s. 478; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 478, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-152.2. Standard transportation practices.

(a) For the purposes of this section, "standard transportation practices" means:

(1) Uniform cargo liability rules.

(2) Uniform bills of lading or receipts for property being transported.

(3) Uniform cargo credit rules.

(4) Antitrust immunity for joint line rates or routes, classification, and mileage guides.

(b) A person otherwise exempt from regulation by the Commission under Public Law 103-305 may file an application with the Commission to participate in one or more standard transportation practices under rules set out by the Commission. (1995, c. 523, s. 10.1.)

**Editor's Note.** — Session Laws 1995, c. 523, s. 33, made this section effective upon ratification. The act was ratified July 29, 1995.

## § 62-157. Dual party relay system.

**Editor's Note.** — The historical citation in parentheses at the end of this section, as set out in the main volume, should read "(1989, c. 599)."

## § 62-158. Natural gas expansion.

(a) In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities in areas within the company's franchised territory that otherwise would not be feasible for the company to construct. The fund shall be supervised and administered by the Commission. Any applicable taxes shall be paid out of the fund.

(b) Sources of funding for a natural gas local distribution company's expansion fund may, pursuant to the order of the Commission, after hearing, include:

(1) Refunds to a local distribution company from the company's suppliers of natural gas and transportation services pursuant to refund orders or requirements of the Federal Energy Regulatory Commission;

(2) Expansion surcharges by the local distribution company charged to customers purchasing natural gas or transportation services throughout that company's franchised ter-

ritory; provided, however, in determining the amount of any surcharge the Commission shall take into account the prices of alternative sources of energy and the need to remain competitive with those alternative sources, and the need to maintain just and reasonable rates for natural gas and transportation services for all customers served by the company; provided further that the expansion surcharge shall not be greater than fifteen cents (15¢) per dekatherm; and

(3) Other sources of funding approved by the Commission.

(c) The application of all such funds to expansion projects shall be pursuant to the order of the Commission. The Commission shall ensure that all projects to which expansion funds are applied are consistent with the intent of this section and G.S. 62-2(9). In determining economic feasibility, the Commission shall employ the net present value method of analysis on a project specific basis. Only those projects with a negative net present value shall be determined to be economically infeasible for the company to construct. In no event shall the Commission authorize a distribution from the fund of an amount greater than the negative net present value of any proposed project as determined by the Commission. If at any time a project is determined by the Commission to have become economically feasible, the Commission may require the company to remit to the expansion fund or to customers appropriate portions of the distributions from the fund related to the project, and the Commission may order such funds to be returned with interest in a reasonable amount to be determined by the Commission. Utility plant acquired with expansion funds shall be included in the local distribution company's rate base at zero cost except to the extent such funds have been remitted by the company pursuant to order of the Commission.

(d) The Commission, after hearing, may adopt rules to implement this section, including rules for the establishment of expansion funds, for the use of such funds, for the remittance to the expansion fund or to customers of supplier and transporter refunds and expansion surcharges or other funds that were sources of the expansion fund, and for appropriate accounting, reporting and ratemaking treatment. The Commission and Public Staff shall report to the Joint Legislative Utility Review Committee on the operation of any expansion funds in conjunction with the reports required under G.S. 62-36A. (1991, c. 598, s. 2.)

**Editor's Note.** — Session Laws 1991, c. 598, s. 11, made this section effective upon ratification. The act was ratified July 8, 1991.

## CASE NOTES

**Expansion fund legislation is a proper delegation of legislative authority** to an administrative agency and is not unconstitutional. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Commission Authority.** — As an administrative agency created by the legislature, the Commission has not been given jurisdiction to determine the constitutionality of legislative enactments, specifically § 62-2(9) or this section. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

The Commission did not act under a misapprehension of applicable law when it granted the petition and established the expansion fund pursuant to a proper interpretation of its authority and discretion to do so. State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 336 N.C. 657, 446 S.E.2d 332 (1994).

**Cited** in State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, 337 N.C. 236, 446 S.E.2d 348 (1994).

## ARTICLE 10.

## *Transportation in General.*

### § 62-200. Duty to transport household goods within a reasonable time.

(a) It shall be unlawful for any common carrier of household goods doing business in this State to omit or neglect to transport within a reasonable time any goods, merchandise or other articles of value received by it for shipment and billed to or from any place in this State, unless otherwise agreed upon between the carrier and the shipper, or unless the same be burned, stolen or otherwise destroyed, or unless otherwise provided by the Commission.

(b) Any common carrier violating any of the provisions of this section shall forfeit to the party aggrieved the sum of fifteen dollars ($15.00) for the first day and two dollars ($2.00) for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of ten dollars ($10.00) for the first day and one dollar ($1.00) for each succeeding day, but the forfeiture shall not be collected for a period exceeding 30 days.

(c) In reckoning what is a reasonable time for such transportation, it shall be considered that such common carrier has transported household goods within a reasonable time if it has done so in the ordinary time required for transporting such articles by similar carriers between the receiving and shipping stations. The Commission is authorized to establish reasonable times for transportation by the various modes of carriage which shall be held to be prima facie reasonable, and a failure to transport within such times shall be held prima facie unreasonable. This section shall be construed to refer not only to delay in starting the household goods from the station where they are received, but to require the delivery at their destination within the time specified: Provided, that if such delay shall be due to causes which could not in the exercise of ordinary care have been foreseen or which were unavoidable, then upon the establishment of these facts to the satisfaction of the court trying the cause, the defendant common carrier shall be relieved from any penalty for delay in the transportation of household goods, but it shall not be relieved from the costs of such action. In all actions to recover penalties against a common carrier under this section, the burden of proof shall be upon such carrier to show where the delay, if any, occurred. The penalties provided in this section shall be in addition to the damages recoverable for failure to transport within a reasonable time.

(d) This section shall not apply to motor carriers of passengers. (Code, s. 1964; 1899, c. 164, s. 2, subsecs. 2, 7; 1903, c. 444; c. 590, s. 3; c. 693; 1905, c. 545; Rev., ss. 1094, 2631, 2632; 1907, cc. 217, 461; C.S., ss. 1053, 3515, 3516; 1933, c. 134, s. 8; 1941, c. 97; 1963, c. 1165, s. 1; 1995, c. 523, s. 11; 1995 (Reg. Sess., 1996), c. 742, s. 33.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "freight" in the catchline and in subsection (c); substituted "household goods" for "property" in subsection (a); and in subsection (c) deleted "of freight" following "such articles" in the first sentence.

The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, in the third sentence of subsection (c), substituted "they are" for "it is", and substituted "their" for "its".

## § 62-203. Claims for loss or damage to goods; filing and adjustment.

(a) Every common carrier receiving household goods for transportation in intrastate commerce shall issue a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such household goods caused by it, or by any carrier participating in the haul when transported on a through bill of lading, and any such carrier delivering said household goods so received and transported shall be liable to the lawful holder of said bill of lading or to any party entitled to recover thereon for such loss, damage, or injury, notwithstanding any contract or agreement to the contrary; provided, however, the Commission may, by regulation or order, authorize or require any such common carrier to establish and maintain rates related to the value of shipments declared in writing by the shipper, or agreed upon as the release value of such shipments, such declaration or agreement to have no effect other than to limit liability and recovery to an amount not exceeding the value so declared or released, in which case, any tariff filed pursuant to such regulation or order shall specifically refer thereto; provided further, that a rate shall be afforded the shipper covering the full value of the goods shipped; provided further, that nothing in this section shall deprive any lawful holder of such bill of lading of any remedy or right of action which such holder has under existing law; provided further, that the carrier issuing such bill of lading, or delivering such household goods so received and transported, shall be entitled to recover from the carrier on whose route the loss, damage, or injury shall have been sustained the amount it may be required to pay to the owners of such property.

(b) Every claim for loss of or damage to household goods while in possession of a common carrier shall be adjusted and paid within 90 days after the filing of such claim with the agent of such carrier at the point of destination of such shipment, or point of delivery to another common carrier, by the consignee or at the point of origin by the consignor, when it shall appear that the consignee was the owner of the shipment: Provided, that no such claim shall be filed until after the arrival of the shipment, or some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof.

(c) In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars ($50.00) for each and every such failure, to be recovered by any consignee aggrieved (or consignor, when it shall appear that the consignor was the owner of the property at the time of shipment and at the time of suit, and is, therefore, the party aggrieved), in any court of competent jurisdiction: Provided, that unless such consignee or consignor recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid; and that no penalty shall be recoverable under the provisions of this section where claims have been filed by both the consignor and consignee, unless the time herein provided has elapsed after the withdrawal of one of the claims.

(d) A check shall be affixed to every parcel of baggage when taken for transportation by the agent or servant of a common carrier, if there is a handle, loop or fixture so that the same can be attached upon the parcel or baggage so offered for transportation, and a duplicate thereof given to the passenger or person delivering the same on his behalf. If such check be refused on demand, the common carrier shall pay to such passenger the sum of ten dollars ($10.00), to be recovered in a civil action; and further, no fare or toll shall be collected or received from such passenger, and if such passenger shall have paid his fare the same shall be refunded by the carrier.

(e) If a passenger, whose bag has been checked, shall produce the check and his baggage shall not be delivered to him, he may by an action recover the value of such baggage.

(f) Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and for the penalties herein provided for, may be united in the same complaint.

(g) This section shall not deprive any consignee or consignor of any other rights or remedies existing against common carriers in regard to freight charges or claims for loss or damage to freight, but shall be deemed and held as creating an additional liability upon such common carriers.

(h) This section shall not apply to motor carriers of passengers and only subsection (a) of this section shall apply to motor carriers of property. (1871-2, c. 138, s. 36; Code, s. 1970; 1905, c. 330, ss. 2, 4, 5; Rev., ss. 2623, 2634, 2635; 1907, c. 983; 1911, c. 139; C.S., ss. 3510, 3524, 3525; 1947, c. 781; c. 1008, s. 27; 1963, c. 1165, s. 1; 1995, c. 523, s. 12.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in subsections (a) and (b); and in the first sentence of subsection (b) deleted "including every express company or person doing an express business within the State" following "common carrier".

## § 62-206. Carrier's right against prior carrier.

Any common carrier shall have all the rights and remedies herein provided for against a common carrier from which it received the household goods in question. Provided, however, that this section shall not apply to motor carriers of passengers. (1905, c. 330, s. 3; Rev., s. 2636; C.S., s. 3526; 1963, c. 1165, s. 1; 1995, c. 523, s. 13.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "freight".

## § 62-209. Sale of unclaimed baggage or household goods; notice; sale of rejected property; escheat.

(a) Any common carrier which has had in its possession on hand at any destination in this State any article whether baggage or household goods, for a period of 60 days from its arrival at destination, which said carrier cannot deliver because unclaimed, may at the expiration of said 60 days sell the same at public auction at any point where in the opinion of the carrier the best price can be obtained: Provided, however, that notice of such sale shall be mailed to the consignor and consignee, by registered or certified mail, if known to such carrier, not less than 15 days before such sale shall be made; or if the name and address of the consignor and consignee cannot with reasonable diligence be ascertained by such carrier, notice of the sale shall be published once a week for two consecutive weeks in some newspaper of general circulation published at the point of sale: Provided, that if there is no such paper published at such point, the publication may be made in any paper having a general circulation in the State: Provided further, however, that if the nondelivery of said article is due to the consignee's and consignor's rejection of it, then such article may be sold by the carrier at public or private sale, and at such time and place as will in the carrier's judgment net the best price, and this without further notice to either consignee or consignor, and without the necessity of publication.

(b) Repealed by Session Laws 1995, c. 523, s. 14, effective July 29, 1995.

(c) The common carrier shall keep a record of the articles sold and of the prices obtained therefor, and shall, after deducting all charges and the expenses of the sale, including advertisement, if advertised, pay the balance to the owner of such articles on demand therefor made at any time within five years from the date of the sale. If no person shall claim the surplus within five years, such surplus shall be paid to the Escheat Fund of the Department of State Treasurer.

(d) This section shall not apply to motor carriers of passengers. (1871-2, c. 138, s. 50; Code, s. 1987; Rev., s. 2639; 1921, c. 124, ss. 1, 2, 3; C.S., s. 3534; 1963, c. 1165, s. 1; 1981, c. 531, s. 17; 1995, c. 523, s. 14.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "freight" in the catchline and subsection (a); and deleted subsection (b) regarding the sale of live, perishable or low value freight.

## § 62-211: Repealed by Session Laws 1995, c. 523, s. 15, effective July 29, 1995.

## ARTICLE 11.

## *Railroads.*

## § 62-220. Powers of railroad corporations.

**Editor's Note.** — Session Laws 1993, c. 235, effective June 29, 1993, provides that Caldwell and Catawba Counties and the Cities of Granite Falls, Hudson, Hickory, Lenoir and Sawmills may create the Carolina and Northwestern Railroad Authority by following the procedures set forth therein.

## § 62-221. Engaging in unauthorized business.

(a) It shall be unlawful for any railroad company incorporated under the laws of this State, or any railroad company incorporated under the laws of any other state and operating one or more railroads in this State, to engage in any business other than the business authorized by its or their charter.

(b) Any railroad company violating the provisions of this section shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be fined in the discretion of the court. (Ex. Sess. 1924, c. 80; 1963, c. 1165, s. 1; 1993, c. 539, s. 479; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 479, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-224. Obstructing highways; defective crossings; notice; failure to repair after notice misdemeanor.

(a) Whenever, in their construction, the works of any railroad corporation shall cross established roads or ways, the corporation shall so construct its works as not to impede the passage or transportation of persons or property along the same. If any railroad corporation shall so construct its crossings with public streets, thoroughfares or highways, or keep, allow or permit the same at any time to remain in such condition as to impede, obstruct or endanger the passage or transportation of persons or property along, over or across the same, the governing body of the county, city or town, or other public road authority having charge, control or oversight of such roads, streets or thoroughfares may give to such railroad notice, in writing, directing it to place any such crossing in good condition, so that persons may cross and property be safely transported across the same.

(b) The notice may be served upon the agent of the offending railroad located nearest to the defective or dangerous crossing about which the notice is given, or it may be served upon the section master whose section includes such crossing. Such notice may be served by delivering a copy to such agent or section master, or by registered or certified mail addressed to either of such persons.

(c) If the railroad corporation shall fail to put such crossing in a safe condition for the passage of persons and property within 30 days from and after the service of the notice, it shall be guilty of a Class 1 misdemeanor. Each calendar month which shall elapse after the giving of the notice and before the placing of such crossing in repair shall be a separate offense.

(d) This section shall in nowise be construed to abrogate, repeal or otherwise affect any existing law now applicable to railroad corporations with respect to highway and street crossings; but the duty imposed and the remedy given by this section shall be in addition to other duties and remedies now prescribed by law. (R.C., c. 61, s. 30; 1874-5, c. 83; Code, s. 1710; Rev., s. 2569; 1915, c. 250, ss. 1, 2; C.S., ss. 3449, 3450; 1963, c. 1165, s. 1; 1993, c. 539, s. 480; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 480, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**This section applies exclusively to established roads and ways.** Harris v. Southern Ry., 100 N.C. App. 373, 396 S.E.2d 623 (1990).

**This Section Held a Safety Statute.** — City ordinance which prescribed that the railroad "do all such ... things as may be necessary for a smooth, easy and comfortable crossing of track by pedestrians and every kind of vehicle" and this section were designed for the protection of the public and are, consequently, safety statutes. Sellers v. CSX Transp., Inc., 102 N.C. App. 563, 402 S.E.2d 872 (1991).

## § 62-226. Cattle guards and private crossings; failure to erect and maintain misdemeanor.

Every company owning, operating or constructing any railroad passing through and over the enclosed land of any person shall, at its own expense, construct and constantly maintain, in good and safe condition, good and sufficient cattle guards at the points of entrance upon and exit from such enclosed land and shall also make and keep in constant repair crossings to any private road thereupon. Every railroad corporation which shall fail to erect and constantly maintain the cattle guards and crossings provided for by this section shall be liable to an action for damages to any party aggrieved, and shall be guilty of a Class 3 misdemeanor and only fined in the discretion of the court. Any cattle guard approved by the Commission shall be deemed a good and sufficient guard under this section. (1883, c. 394, ss. 1, 2, 3; Code, s. 1975; Rev., ss. 2601, 3753; 1915, c. 127; C.S., s. 3454; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1963, c. 1165, s. 1; 1993, c. 539, s. 481; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 481, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### CASE NOTES

**Applicability to Completely Enclosed Land and Actions Involving Cattle Guards or Crossings.** — This section applies only to completely enclosed land and contemplates that the statute be utilized only for actions involving cattle guards or crossings. Harris v. Southern Ry., 100 N.C. App. 373, 396 S.E.2d 623 (1990).

## § 62-229. Shelter at division points required; failure to provide a misdemeanor.

(a) It shall be the duty of every person that may now or hereafter own, control, or operate any line of railroad in this State, to erect and maintain at every division point where cars are regularly taken out of trains for repairs or construction work, or where other railroad equipment is regularly made, repaired, or constructed, a building or shed with a suitable and sufficient roof over the repair and construction track or tracks so as to provide that all men or employees permanently employed in the construction and repair of cars, trucks, or other railroad equipment of whatever description shall be under shelter and protected during snows, rains, sleets, hot sunshine, and other inclement weather: Provided, the Commission shall have the power to direct the points at which sheds shall be erected, and the character of the sheds: Provided further, that such order shall only be made after a hearing of which public notice shall have been given.

(b) Any person failing to comply with the requirements of this section shall be guilty of a Class 3 misdemeanor, and for each offense shall only be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). Each day of such failure shall constitute a separate offense. (1913, cc. 65, 117; C.S., s. 6557; 1933, c. 134; 1941, c. 97; 1963, c. 1165, s. 1; 1993, c. 539, s. 482; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 482, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-235: Repealed by Session Laws 1995 (Regular Session, 1996), c. 673, s. 3, effective July 1, 1996.

**Editor's Note.** — Session Laws 1995, (Reg. Sess., 1996), c. 673, s. 1, provides: "The statutory authority, powers, duties, and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and purchasing, of the Rail Safety Section of the Transportation Division of the North Carolina Utilities Commission, is transferred to the Department of Transportation."

**§ 62-236:** Recodified as § 136-20.1 by Session Laws 1995 (Regular Session, 1996), c. 673, s. 5, effective July 1, 1996.

## ARTICLE 12.

## *Motor Carriers.*

### § 62-260. Exemptions from regulations.

(a) Nothing in this Chapter shall be construed to include persons and vehicles engaged in one or more of the following services by motor vehicle if not engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation:

(1) Transportation of passengers or household goods for or under the control of the State of North Carolina, or any political subdivision thereof, or any board, department or commission of the State, or any institution owned and supported by the State;

(2) Transportation of passengers by taxicabs when not carrying more than fifteen passengers or transportation by other motor vehicles performing bona fide taxicab service and not carrying more than fifteen passengers in a single vehicle at the same time when such taxicab or other vehicle performing bona fide taxicab service is not operated on a regular route or between termini; provided, no taxicab while operating over the regular route of a common carrier outside of a municipality and a residential and commercial zone adjacent thereto, as such zone may be determined by the Commission as provided in subdivision (8) of this subsection, shall solicit passengers along such route, but nothing herein shall be construed to prohibit a taxicab operator from picking up passengers along such route upon call, sign or signal from prospective passengers;

(3) Transportation by motor vehicles owned or operated by or on behalf of hotels while used exclusively for the transportation of hotel patronage between hotels and local railroad or other common carrier stations;

(4) Transportation of passengers to and from airports and passenger airline terminals when such transportation is incidental to transportation by aircraft;

(5) Transportation of passengers by trolley buses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service;

(6) Transportation by motor vehicles used exclusively for the transportation of passengers to or from religious services or transportation of pupils and employees to and from private or parochial schools or transportation to and from functions for students and employees of private or parochial schools;

(7) Transportation of any bona fide employees to and from their place(s) of regular employment;

(8) Transportation of passengers when the movement is within a municipality exclusively, or within contiguous municipalities and within a residential and commercial zone adjacent

to and a part of such municipality or contiguous municipalities; provided, the Commission shall have power in its discretion, in any particular case, to fix the limits of any such zone;

(9) through (17) Repealed by Session Laws 1995, c. 523, s. 16, effective July 29, 1995.

(18) Charter parties, as defined by this subdivision when such charter party is sponsored or organized by, and used by, any organized senior citizen group whose members are sixty (60) years of age or older. Such charter party shall be subject to subsections (f) and (g) of this section. "Charter party", for the purpose of this subdivision, means a group of persons who, pursuant to a common purpose and under a single contract, and at a fixed charge for the vehicle, have acquired the exclusive use of a passenger-carrying motor vehicle to travel together as a group from a point of origin to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.

(b) The Commission shall have jurisdiction to fix rates of carriers of passengers operating as described in (5) and (8) of subsection (a) of this section in the manner provided in this Chapter, and shall have jurisdiction to hear and determine controversies with respect to extensions and services, and the Commission's rules of practice shall include appropriate provisions for bringing such controversies before the Commission and for the hearing and determination of the same; provided nothing in this paragraph shall include taxicabs.

(c) The Commission may conduct investigations to determine whether any person purporting to operate under the exemption provisions of this section is, in fact, so operating, and make such orders as it deems necessary to enforce compliance with this section.

(d) The venue for any action commenced to enforce compliance with the terms of this Article against any person purporting to operate under any of the exemptions provided in this section shall be in one of the counties of the superior court district or set of districts as defined in G.S. 7A-41.1 wherein the violation is alleged to have taken place and such person shall be entitled to trial by jury.

(e) None of the provisions of this section nor any of the provisions of this Chapter shall be construed so as to prohibit or regulate the transportation of property by any motor carrier when the movement is within a municipality or within contiguous municipalities and within a zone adjacent to and commercially a part of such municipality or contiguous municipalities, as defined by the Commission. The Commission shall have the power in its discretion, in any particular case, to fix the limits of any such zone. Nothing herein shall be construed as an abridgment of the police powers of any municipality over such operation wholly within any such municipality. Nothing in this Chapter shall be construed to prohibit or regulate the transportation of household effects of families from one residence to another by persons who do not hold themselves out as being, and are not generally engaged in the business of transporting such property for compensation.

(f) Notwithstanding the exemption for transportation of passengers and household goods provided under subsections (a) through (e) of this section, all motor carriers transporting passengers for compensation under said exemptions or under any special exemptions granted by the Utilities Commission under G.S. 62-261 shall be subject to the same requirements for security for protection of the public as are established for regulated motor common carriers by the rules of the Utilities Commission pursuant to G.S. 62-268, and all such motor carriers transporting for hire under said exemption provisions shall further be subject to the same requirements for safety of operation of said motor vehicles as are required of regulated motor common carriers under the provisions of Chapter 20 and the regulations of the Division adopted pursuant thereto. The Division is authorized to promulgate rules and regulations for the enforcement of said requirements in the case of all such exempt operations, and the officers and agents of the Division shall have full authority to inspect said exempt vehicles and to apply all enforcement regulations and penalties for violation of said security regulations and safety regulations as in the case of regulated motor carriers.

(g) The owners of all motor vehicles used in any transportation for compensation which is declared to be exempt under this section shall register such operation with the Division of Motor Vehicles and shall secure from the Division of Motor Vehicles a certificate of exemption. (1947, c. 1008, s. 4; 1949, c. 1132, s. 5; 1951, c. 987, s. 1; 1953, c. 1140, s. 2; 1955, c. 1194, ss. 1, 2; 1959, c. 102, c. 639, s. 15; 1963, c. 1165, c. 1; 1967, cc. 1135, 1203; 1969, c. 681; 1971, cc. 856, 1192; 1973, c. 175; 1977, c. 217; 1979, c. 204, s. 1; 1985, c. 454, ss. 9-11; 1987 (Reg. Sess., 1988), c. 1037, s. 94; 1995, c. 523, s. 16.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in subdivision (a)(1) and subsection (f); and deleted subdivisions (a)(9) through (a)(17) regarding, in part, the transportation of highway construction materials, newspapers, insecticides and fungicides, livestock and fish, and raw forest products.

## § 62-261. Additional powers and duties of Commission applicable to motor vehicles.

The Commission is hereby vested with the following powers and duties:

(1) To supervise and regulate bus companies and to that end, the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage, newspapers, mail and light express, uniform system of accounts, records and reports and preservation of records.

(2) To supervise the operation and safety of passenger bus stations in any manner necessary to promote harmony among the carriers using such stations and efficiency of service to the traveling public.

(3) Repealed by Session Laws 1985, c. 454, s. 12, effective June 24, 1985.

(4) For the purpose of carrying out the provisions of this Article, the Utilities Commission may avail itself of the special information of the Board of Transportation in promulgating safety requirements and in considering applications for certificates or permits with particular reference to conditions of the public highway or highways involved, and the ability of the said public highway or highways to carry added traffic; and the Board of Transportation, upon re-

quest of the Utilities Commission, shall furnish such information.

(5) The Commission may, without prior notice and hearing, make and enter any order, rule, regulation, or requirement, not affecting rates, upon unanimous finding by the Commission of the existence of an emergency and make such order, rule, regulation or requirement effective upon notice given to each affected motor carrier by registered mail, or by certified mail pending a hearing thereon as provided in this subdivision. It shall not be necessary for the Commission to give notice to the carriers affected or to hold a hearing prior to a revision in the rules regarding procedures to be followed in filing rates. Any such emergency order, rule, regulation or requirement shall be subject to continuation, modification, change, or revocation after notice and hearing and all such emergency orders, rules, regulations and requirements shall be supplanted and superseded by any final order, rule, regulation or requirement entered by the Commission.

(6) The Commission shall regulate brokers and make and enforce reasonable requirements respecting their licenses, financial responsibility, accounts, records, reports, operations and practices.

(7) Repealed by Session Laws 1985, c. 454, s. 12, effective June 24, 1985.

(8) To determine, upon its own motion, or upon motion by a motor carrier, or any other party in interest, whether the transportation of household goods in intrastate commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation in this State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in intrastate commerce. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this Article, and shall attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in intrastate commerce performed by the carrier or class of carriers designated in such certificate will be, or shall have become, or is reasonably likely to become, or such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of intrastate transportation by motor carriers in effectuating the policy declared in this Chapter. Upon revocation of any such certificate, the Commission shall restore to the carrier or carriers affected thereby, without further proceedings, the authority, if any, to operate in intrastate commerce held by such carrier or carriers at the time the certificate of exemption pertaining to such carrier or carriers became effective. No certificate of exemption

shall be denied, and no order of revocation shall be issued, under this paragraph, except after reasonable opportunity for hearing to interested parties.

(9) To inquire into the management of the business of motor carriers and into the management of business of persons controlling, controlled by or under common control with, motor carriers to the extent that such persons have a pecuniary interest in the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this Article.

(10) Repealed by Session Laws 1985, c. 454, s. 12, effective June 24, 1985.

(11) The Commission may from time to time establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" as the special nature of the service performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements, consistent with the provisions of this Article, to be observed by such carriers so classified or grouped, as the Commission deems necessary or desirable in the public interest. (1947, c. 1008, s. 5; 1949, c. 1132, s. 6; 1953, c. 1140, s. 5; 1957, c. 65, s. 11; c. 1152, s. 7; 1961, c. 472, s. 9; 1963, c. 1165, s. 1; 1969, c. 723, s. 2; c. 763; 1973, c. 507, s. 5; 1985, c. 454, s. 12; c. 676, s. 18; 1995, c. 523, s. 17.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in subdivision (8); and in subdivision (11) deleted "or contract carrier by motor vehicle" following "'common carrier by motor vehicle'".

## § 62-262. Applications and hearings other than for bus companies.

(a) Except as otherwise provided in G.S. 62-260[,] G.S. 62-262.1 and 62-265, no person shall engage in the transportation of passengers or household goods in intrastate commerce unless such person shall have applied to and obtained from the Commission a certificate authorizing such operations, and it shall be unlawful for any person knowingly or wilfully to operate in intrastate commerce in any manner contrary to the provisions of this Article, or of the rules and regulations of the Commission. No certificate shall be amended so as to enlarge or in any manner extend the scope of operations of a motor carrier without complying with the provisions of this section.

(b) Upon the filing of an application for a certificate, the Commission shall, within a reasonable time, fix a time and place for hearing such application. The Commission shall from time to time prepare a truck calendar containing notice of such hearings, a copy of which shall be mailed to the applicant and to any other persons desiring it, upon payment of charges to be fixed by the Commission. The notice or calendar herein required shall be mailed at least 20 days prior to the date fixed for the hearing, but the failure of any person, other than applicant, to receive such notice or calendar shall not, for that reason, invalidate the action of the Commission in granting or denying the application.

(c) The Commission may, in its discretion, except where a regular calendar providing notice is issued, require the applicant to give notice of the time and place of such hearing together with a brief description of the purpose of said hearing and the exact route or routes and authority applied for, to be published not less than once each week for two successive weeks in one or more newspapers of general circulation in the territory proposed to be served. The Commission may in its discretion require the applicant to give such other and further notice in the form and manner prescribed by the Commission to the end that all interested parties and the general public may have full knowledge of such hearing and its purpose. If the Commission requires the applicant to give notice by publication, then a copy of such notice shall be immediately mailed by the applicant to the Commission, and upon receipt of same the chief clerk shall cause the copy of notice to be entered in the Commission's docket of pending proceedings. The applicant shall, prior to any hearing upon his application, be required to satisfy the Commission that such notice by publication has been duly made, and in addition to any other fees or costs required to be paid by the applicant, the applicant shall pay into the office of the Commission the cost of the notices herein required to be mailed by the Commission.

(d) Any motor carrier desiring to protest the granting of an application for a certificate, in whole, or in part, may become a party to such proceedings by filing with the Commission, not less than 10 days prior to the date fixed for the hearing, unless the time be extended by order of the Commission, its protest in writing under oath, containing a general statement of the grounds for such protest and the manner in which the protestant will be adversely affected by the granting of the application in whole or in part. Such protestant may also set forth in his protest its proposal, if any, to render either alone or in conjunction with other motor carriers, the service proposed by the applicant, either in whole or in part. Upon the filing of such protest it shall be the duty of the protestant to file three copies with the Commission, and the protestant shall certify that a copy of said protest has been delivered or mailed to the applicant or applicant's attorney. When no protest is filed with the Commission within the time herein limited, or as extended by order of the Commission, the Commission may proceed to decide the application on the basis of testimony taken at a hearing, or on the basis of information contained in the application and sworn affidavits, and make the necessary findings of fact and issue or decline to issue the certificate applied for without further notice. Persons other than motor carriers shall have the right to appear before the Commission and give evidence in favor of or against the granting of any application and with permission of the Commission may be accorded the right to examine and cross-examine witnesses.

(e) The burden of proof shall be upon the applicant for a certificate to show to the satisfaction of the Commission:

(1) That public convenience and necessity require the proposed service in addition to existing authorized transportation service, and

(2) That the applicant is fit, willing and able to properly perform the proposed service, and

(3) That the applicant is solvent and financially able to furnish adequate service on a continuing basis.

(f) through (h) Repealed by Session Laws 1985, c. 676, s. 19, effective July 10, 1985.

(i), (j) Repealed by Session Laws 1995, c. 523, s. 18, effective July 29, 1995.

(k) The Commission shall by general order, or rule, having regard for the public convenience and necessity, provide for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(*l*) The provisions of this section shall not be applicable to applications for certificates of authority by bus companies or related hearings. (1947, c. 1008, s. 11; 1949, c. 1132, s. 10; 1953, c. 825, s. 3; 1957, c. 1152, ss. 8, 9; 1959, c. 639, s. 11; 1963, c. 1165, s. 1; 1965, c. 214; 1981, c. 193, s. 4; 1985, c. 676, s. 19; 1995, c. 523, s. 18.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, in subsection (a), substituted "household goods" for "property" and deleted "or permit" following "certificate" in the first and second sentences; in subsection (b) deleted "or a permit" following "certificate" in the first sentence and deleted the former second sentence regarding applications by contract carriers of passengers; in subsection (d) deleted "or permit" following "certificate" in the first and fourth sentences; in subsection (e) deleted "If the application is for a certificate" from the beginning, and inserted "for a certificate"; and deleted subsections (i) and (j), regarding considerations by the commission and modification of permits.

## § 62-262.2. Discontinuance or reduction in service.

(a) When a bus company proposes to discontinue service over any intrastate route or proposes to reduce its level of service to any points on a route to a level which is less than one trip per day (excluding Saturdays and Sundays), it shall petition the Commission for permission to do so. Within 10 days after the filing of a petition, the Commission shall require notice to be given.

(b) Any person or the Public Staff may object, to the Commission, to the granting of permission to any bus company to discontinue or reduce transportation under this section. If neither objects to the granting of permission to discontinue or reduce service under this section, within 30 days after the notice as required by subsection (a) of this section, the Commission may grant the permission based on the record and without hearing.

(c) If, within 30 days after the notice as required by subsection (a) of this section, any person or the Public Staff objects in writing to the Commission to granting of such permission, the Commission shall grant such permission unless the Commission finds as a fact, that the discontinuance or reduction in service is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce. In making a finding under this subsection, the Commission shall accord great weight to the extent to which the interstate and intrastate revenues from the transportation proposed to be reduced or discontinued are less than the variable costs of providing the transportation, including depreciation for revenue equipment. The Commission may also consider, to the extent applicable, all other factors which are to be considered by the Interstate Commerce Commission in a proceeding commenced under 49 U.S.C. § 10935. For the purposes of this section, the bus company filing a petition for permission to discontinue or reduce service shall have the burden of proving (i) the amount of its interstate and intrastate revenues received for transportation to, from or between, but not through, points on the involved intrastate route; and (ii) the system variable costs of providing the transportation.

(d) The Commission may make its determination with or without a public hearing. The Commission shall take final action upon the petition not later than 120 days after any written objections to the petition are filed.

(e) The provisions of G.S. 62-262(k) shall not be applicable to bus companies. (1985, c. 676, s. 21; 1989 (Reg. Sess., 1990), c. 1024, s. 15.)

**§ 62-264:** Repealed by Session Laws 1995, c. 523, s. 19, effective July 29, 1995.

## § 62-265. Emergency operating authority.

To meet unforeseen emergencies, the Commission may, upon its own initiative, or upon written request by any person, department or agency of the State, or of any county, city or town, with or without a hearing, grant appropriate authority to any owner of a duly licensed vehicle or vehicles, whether such owner holds a certificate or not, to transport passengers or household goods between such points, or within such area during the period of the emergency and to the extent necessary to relieve the same, as the Commission may fix in its order granting such authority; provided, that unless the emergency is declared by the General Assembly or under its authority, the Commission shall find from such request, or from its own knowledge or conditions, that a real emergency exists and that relief to the extent authorized in its order is immediate, pressing and necessary in the public interest, and that the carrier so authorized has the necessary equipment and is willing to perform the emergency service as prescribed by the order. In all cases, under this section, the Commission shall first afford the holders of certificates operating in the territory affected an opportunity to render the emergency service. Upon the termination of the emergency, the operating privileges so granted shall automatically expire and the Commission shall forthwith withdraw all operating privileges granted to any person under this section. (1947, c. 1008, s. 17; 1949, c. 1132, s. 17; 1963, c. 1165, s. 1; 1995, c. 523, s. 20.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, in the first sentence, deleted "or permit" following "certificate" and substituted "household goods" for "property, baggage, mail, newspapers and light express"; and in the second sentence deleted "or permits" following "certificates".

## § 62-267. Deviation from regular route operations.

(a) A common carrier of passengers by motor vehicle operating under a certificate issued by the Commission may occasionally deviate from the routes over which it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(b) Repealed by Session Laws 1995, c. 523, s. 21, effective July 29, 1995.

(c) In no event shall the operation of empty equipment by any carrier over any route or highway be construed as a violation of the rights of any carrier. (1947, c. 1008, s. 18; 1949, c. 1132, s. 18; 1963, c. 1165, s. 1; 1995, c. 523, s. 21.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, repealed subsection (b) regarding common carriers who hold certificates.

## § 62-268. Security for protection of public; liability insurance.

No certificate or broker's license shall be issued or remain in force until the applicant shall have procured and filed with the Division of Motor Vehicles such security bond, insurance or self-insurance for the protection of the public as the Commission shall by regulation require. The Commission shall require that every motor carrier for which a certificate or license is required by the provision of this Chapter, shall maintain liability insurance or satisfactory surety of at least fifty thousand dollars ($50,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, one hundred thousand dollars ($100,000) because of bodily injury to or death of two or more persons in any one accident, and fifty thousand dollars ($50,000) because of injury to or destruction of property of others in any one accident; and the Commission may require any greater amount of insurance as may be necessary for the protection of the public. Notwithstanding any rule or regulation to the contrary, the Commission shall not require that any insurance procured and filed be provided in any single policy of insurance or through a single insurer, if the insurers involved are otherwise qualified. A motor carrier may satisfy the requirements of the Commission by procuring insurance with coverage and limits of liability required by the Commission in one or more policies of insurance issued by one or more insurers.

Notwithstanding any other provisions of this section or Chapter, bus companies shall file with the Commission proof of financial responsibility in the form of bonds, policies of insurance, or shall qualify as a self insurer, with minimum levels of financial responsibility as prescribed for motor carriers of passengers pursuant to the provisions of 49 U.S.C. § 10927(a)(1). Provided, further, that no bus company operating solely within the State of North Carolina and which is exempt from regulation under the provisions of G.S. 62-260(a)(7) shall be required to file with the Commission proof of the financial responsibility in excess of one million five hundred thousand dollars ($1,500,000). (1947, c. 1008, s. 19; 1949, c. 1132, s. 19; 1963, c. 1165, s. 1; 1973, c. 1206; 1977, c. 920; 1985, c. 454, s. 14; c. 676, s. 22; 1987, c. 374; 1995, c. 523, s. 22.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, deleted "permit" following "certificate" in the first and second sentences of the first paragraph.

## § 62-270. Orders, notices, and service of process.

It shall be the duty of every motor carrier operating under a certificate issued under the provisions of this Article to file with the Division of Motor Vehicles a designation in writing of the name and post-office address of a person upon whom service of notices or orders may be made under this Article. Such designation may from time to time be changed by like writing similarly filed. Service of notice or orders in proceedings under this Article may be made upon a motor carrier by personal service upon it or upon the person so designated by it, or by registered mail, return receipt requested, or by certified mail with return receipt requested, addressed to it or to such person at the address filed. In proceedings before the Commission involving the lawfulness of rates, charges, classifications, or practices, service of notice upon the person or agent who has filed a tariff or schedule in behalf of such carrier shall be deemed to be due and sufficient service upon the carrier. (1947, c. 1008, s. 29; 1949, c. 1132, s. 26; 1957, c. 1152, ss. 6, 11; 1963, c. 1165, s. 1; 1985, c. 454, s. 15; 1995, c. 523, s. 23.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, deleted "or permit" following "certificate" in the first sentence.

## § 62-271. Collection of rates and charges of motor carriers of household goods.

No common carriers of household goods by motor vehicle shall deliver or relinquish possession at destination of any freight transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges, including rules and regulations for weekly or monthly settlement, and to prevent unjust discrimination or undue preference or prejudice; provided, that the provisions of this section shall not be construed to prohibit any such carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for the State, or political subdivision thereof. Where any common carrier by motor vehicle is instructed by a shipper or consignor to deliver household goods transported by such carrier to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such household goods (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the household goods have been delivered to him, if the consignee (i) is an agent only and had no beneficial title in the household goods, and (ii) prior to delivery of the household goods has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the household goods. In such cases the shipper and consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made. If the consignee has given to the carrier erroneous information as to who is the beneficial owner, such consignee shall himself be liable for such additional charges, notwithstanding the foregoing provisions of this section. On shipments reconsigned or diverted by an agent who has furnished the carrier with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. (1947, c. 1008, s. 31; 1963, c. 1165, s. 1; 1995, c. 523, s. 24.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in the catchline and throughout the section, and substituted "have" for "has" following "household goods" in the second sentence.

## § 62-272. Allowance to shippers for transportation services.

If the owner of household goods transported under the provisions of this Article directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in the tariffs or schedules filed in the manner provided in this Article and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order. (1947, c. 1008, s. 32; 1963, c. 1165, s. 1; 1995, c. 523, s. 25.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in the first sentence.

## § 62-273. Embezzlement of C.O.D. shipments.

Household goods received by any motor carrier to be transported in intrastate commerce and delivered upon collection on such delivery and remittance to the shipper of the sum of money stated in the shipping instructions to be collected and remitted to the shipper, and the money collected upon delivery of such party, are hereby declared to be held in trust by any carrier having possession thereof or the carrier making the delivery or collection, and upon failure of any such carrier to account for the household goods so received, either to the shipper to whom the collection is payable or the carrier making delivery to any carrier handling the household goods or making the collection, within 15 days after demand in writing by the shipper, or carrier, or upon failure of the delivering carrier to remit the sum so directed to be collected and remitted to the shipper, within 15 days after collection is made, shall be prima facie evidence that the household goods so received, or the funds so received, have been wilfully converted by such carrier to its own use, and the carrier so offending shall be guilty of a Class H felony and such carrier may be indicted, tried, and punished in the county in which such shipment was delivered to the carrier or in any other county into or through which such shipment was transported by such carrier. (1947, c. 1008, s. 33; 1963, c. 1165, s. 1; 1993, c. 539, s. 1277; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 523, s. 26.)

**Editor's Note.** — Session Laws 1993, c. 539, s. 1277, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" throughout the section, and made related grammatical changes.

## § 62-278. Revocation of license plates by Utilities Commission.

(a) The license plates of any carrier of persons or household goods by motor vehicle for compensation may be revoked and removed from the vehicles of any such carrier for wilful violation of any provision of this Chapter, or for the wilful violation of any lawful rule or regulation made and promulgated by the Utilities Commission. To that end the Commission shall have power upon complaint or upon its own motion, after notice and hearing, to order the license plates of any such offending carrier revoked and removed from the vehicles of such carrier for a period not exceeding 30 days, and it shall be the duty of the Department of Motor Vehicles to execute such orders made by the Utilities Commission upon receipt of a certified copy of the same.

(b) This section shall be in addition to and independent of other provisions of law for the enforcement of the motor carrier laws of this State. (1951, c. 1120; 1963, c. 1165, s. 1; 1995, c. 523, s. 27.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "household goods" for "property" in the first sentence of subsection (a).

## § 62-279. Injunction for unlawful operations.

If any motor carrier, or any other person or corporation, shall operate a motor vehicle in violation of any provision of this Chapter applicable to motor carriers or motor vehicles generally, except as to the reasonableness of rates or charges and the discriminatory character thereof, or shall operate in violation of any rule, regulation, requirement or order of the Commission, or of any term or condition of any certificate, the Commission or any holder of a certificate duly issued by the Commission may apply to a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 in which the motor carrier or other person or corporation so operates, for the enforcement of any provisions of this Article, or of any rule, regulation, requirement, order, term or condition of the Commission. Such court shall have jurisdiction to enforce obedience to this Article or to any rule, order, or decision of the Commission by a writ of injunction or other process, mandatory or otherwise, restraining such carrier, person or corporation, or its officers, agents, employees and representatives from further violation of this Article or of any rule, order, regulation, or decision of the Commission. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16;

1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 95; 1995, c. 523, s. 28.)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, twice deleted "or permit" following "certificate".

## Article 14.

## *Fees and Charges.*

### § 62-300. Particular fees and charges fixed; payment.

(a) The Commission shall receive and collect the following fees and charges in accordance with the classification of utilities as provided in rules and regulations of the Commission, and no others:

(1) Twenty-five dollars ($25.00) with each notice of appeal to the Court of Appeals or the Supreme Court, and with each notice of application for a writ of certiorari.

(2) With each application for a new certificate for motor and rail carrier rights, the fee shall be two hundred fifty dollars ($250.00) when filed by Class 1 motor and rail carriers, one hundred dollars ($100.00) when filed by Class 2 motor and rail carriers, and twenty-five dollars ($25.00) when filed by Class 3 motor and rail carriers, and twenty-five dollars ($25.00) as filing fee for any amendment thereto so as to extend or enlarge the scope of operations thereunder, and twenty-five dollars ($25.00) for each broker who applies for a brokerage license under the provisions of this Chapter.

(3) With each application for a general increase in rates, fares and charges and for each filing of a tariff which seeks general increases in rates, fares and charges, the fee will be five hundred dollars ($500.00) for Class A utilities and Class 1 motor and rail carriers, two hundred fifty dollars ($250.00) for Class B utilities and Class 2 motor and rail carriers, one hundred dollars ($100.00) for Class C utilities and twenty-five dollars ($25.00) for Class D utilities and Class 3 motor and rail carriers; provided that in the case of an application or tariff for a general increase in rates filed by a tariff agent for more than one carrier, the applicable fee shall be the highest fee prescribed for any motor carrier included in the application or tariff. This fee shall not apply to applications for adjustments in particular rates, fares, or charges for the purpose of eliminating inequities, preferences or discriminations or to applications to adjust rates and charges based solely on the increased cost of fuel used in the generation or production of electric power.

(4) One hundred dollars ($100.00) with each application by motor carrier of passengers for the abandonment or permanent or temporary discontinuance of transportation service previously authorized in a certificate.

(4a) Two hundred fifty dollars ($250.00) with each application for discontinuance of train service, or for a change in or discontinuance of station facilities.

(5) With each application for a certificate of public convenience and necessity or for any amendment thereto so as to extend

or enlarge the scope of operations thereunder, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities, one hundred dollars ($100.00) for Class B utilities, and twenty-five dollars ($25.00) for Class C and D utilities and twenty-five dollars ($25.00) for any other person seeking a certificate of public convenience and necessity.

(5a) With each application by a bus company for an original certificate of authority or for any amendment thereto or to an existing certificate of public convenience and necessity so as to extend or enlarge the scope of operations thereunder the fee shall be two hundred fifty dollars ($250.00).

(6) With each application for approval of the issuance of securities or for the approval of any sale, lease, hypothecation, lien, or other transfer of any household goods or operating rights of any carrier or public utility over which the Commission has jurisdiction, the fee shall be two hundred fifty dollars ($250.00) for Class A utilities and Class 1 motor and rail carriers, one hundred dollars ($100.00) for Class B utilities and Class 2 motor and rail carriers, and twenty-five dollars ($25.00) for Class C and D utilities and Class 3 motor and rail carriers; provided, that in the case of sales, leases and transfers between two or more carriers or utilities, the applicable fee shall be the highest fee prescribed for any party to the transaction.

(7) Ten dollars ($10.00) with each application, petition, or complaint not embraced in (2) through (6) of this section, wherein such application, petition, or complaint seeks affirmative relief against a carrier or public utility over which the Commission has jurisdiction. This fee shall not apply to applications for adjustments in particular rates, fares or charges for the purpose of eliminating inequities, preferences or discriminations; nor shall this fee apply to applications, petitions, or complaints made by any county, city or town; nor shall this fee apply to applications or petitions made by individuals seeking service or relief from a public utility.

(8) Repealed by Session Laws 1985, c. 454, s. 18.

(9) One dollar ($1.00) for each page (8½ x 11 inches) of transcript of testimony, but not less than five dollars ($5.00) for any such transcript.

(10) Twenty cents (20¢) for each page of copies of papers, orders, certificates or other records, but not less than one dollar ($1.00) for any such order or record, plus five dollars ($5.00) for formal certification of any such paper, order or record.

(11), (12) Repealed by Session Laws 1985, c. 454, s. 18.

(13) Two hundred fifty dollars ($250.00) with each application for a certificate of public convenience and necessity to construct a transmission line.

(14) Twenty-five dollars ($25.00) with each filing by a person otherwise exempt from Commission regulation under Public Law 103-305 to participate in standard transportation practices as set out by the Commission.

(b) All witness fees, officers' fees serving papers, and cost of serving notice by publication shall be paid by the party at whose instance or for whose benefit such fees and costs are incurred.

(c) No application, petition, complaint, notice of appeal, notice of application for writ of certiorari, or other document or paper, the filing of which requires the payment of a fee under this Article, shall be deemed filed until the fees herein required shall have been paid to the Commission.

(d) The fees and charges as set forth in subdivisions (1), (7), (9) and (10) of subsection (a) of this section shall not apply to the State of North Carolina or to any board, department, commission, institution or other agency of the State; and all applications, petitions or complaints submitted by the State of North Carolina or any board, department, commission, institution or other agency of the State shall be filed without the payment of the fees required by this section. All transcripts, papers, orders, certificates, or other records necessary to perfect an appeal, or to determine whether an appeal is to be taken, shall be furnished without charge to the Attorney General upon his request in cases in which the Attorney General appears in the public interest or as representing any board, department, commission, institution or other agency of the State. (1953, c. 825, s. 1; 1955, c. 64; 1957, c. 1152, s. 15; 1961, c. 472, ss. 2-4; 1963, c. 1165, s. 1; 1967, c. 1039; c. 1190, s. 7; 1969, c. 721, s. 2; 1971, c. 736, s. 2; 1975, c. 447, s. 1; 1977, c. 1003; 1977, 2nd Sess., c. 129, s. 32; 1979, c. 792; 1985, c. 311, ss. 1-4; c. 454, ss. 18, 19; c. 676, s. 24; 1991, c. 189, s. 2; 1995, c. 523, ss. 29, 32.)

**Editor's Note.** — Session Laws 1991, c. 189, s. 2, which amended this section by adding subdivision (a)(13), became effective December 1, 1991, but was not applicable to any transmission line that the public utility or other person had begun to construct before that date.

**Effect of Amendments.** — Session Laws 1995, c. 523, s. 29, effective July 29, 1995, in subdivision (a)(2) deleted "or new permit" following "certificate"; in subdivision (a)(6) substituted "household goods" for "property"; and added subdivision (a)(14).

Session Laws 1995, c. 523, s. 32, effective August 1, 1995, in subdivision (a)(4) deleted "with each application for discontinuance of train service, or for a change in or discontinuance of station facilities and" following "($100.00)"; and added subdivision (a)(4a).

## § 62-301: Repealed by Session Laws 1989, c. 787, s. 2, effective July 1, 1989.

**Editor's Note.** —

Session Laws 1991, c. 451, s. 1, effective June 28, 1991, amends Session Laws 1989, c. 787, s. 5, as set out in the main volume under this section, so as to delete the provision that repeal of the section would expire June 30, 1991, and the provision for reversion of proceeds and interest to the General Fund. As amended, Session Laws 1989, c. 787, s. 5, provides "This act shall become effective July 1, 1989 and shall apply to public utility North Carolina jurisdictional revenues earned on or after that date."

The section is set out above as repealed.

## § 62-302. Regulatory fee.

**Editor's Note.** —

Session Laws 1989 (Reg. Sess., 1990), c. 937, s. 1, effective July 17, 1990, and applicable to public utility North Carolina jurisdictional revenues earned on or after July 1, 1990, provides: "For the 1990-91 fiscal year, the percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is twelve hundredths percent (0.12%) of each public utility's North Carolina jurisdictional revenues for each quarter."

Session Laws 1991, c. 451, s. 1 amends

Session Laws 1989, c. 787, s. 5, as set out in the main volume under this section, so as to delete the June 30, 1991, expiration provision and the provision for reversion of proceeds and interest to the General Fund. As amended, Session Laws 1989, c. 787, s. 5, provides "This act shall become effective July 1, 1989 and shall apply to public utility North Carolina jurisdictional revenues earned on or after that date."

Session Laws 1991, c. 689, s. 143, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is nine hundredths percent (0.09%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1991."

Session Laws 1991, c. 689, s. 352 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1991-93 biennium, the textual provisions of Titles I, II, and III of this act shall apply only to funds appropriated for and activities occurring during the 1991-93 biennium."

Session Laws 1991 (Reg. Sess., 1992), c. 811, s. 8, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is eighty-five thousandths percent (0.085%) of each public utilities North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1992."

Section 9 of Session Laws 1991 (Reg. Sess., 1992), c. 811 provides: "Sections 1 through 6 and Section 8 become effective July 1, 1992. Section 7 of this act is effective for taxable years beginning on or after January 1, 1992. Sections 1 through 5 of this act shall apply to all fees assessed or paid on or after July 1, 1992."

Session Laws 1993, c. 320, s. 1, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is eight and one-half hundredths percent (0.085%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1993."

Session Laws 1993 (Reg. Sess., 1994), c. 664, in s. 2 provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is eight and one-half hundredths percent (0.085%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1994."

Session Laws 1995, c. 178, s. 2(a), effective July 1, 1995, provides: "The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is ten hundredths percent (0.10%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1995."

Session Laws 1995 (Reg. Sess., 1996), c. 670, s. 2, provides:

"(a) The percentage rate to be used in calculating the public utility regulatory fee under G.S. 62-302(b)(2) is ten hundredths percent (0.10%) of each public utility's North Carolina jurisdictional revenues earned during each quarter that begins on or after July 1, 1996.

"(b) This section becomes effective July 1, 1996."

### OPINIONS OF ATTORNEY GENERAL

**The Department of Correction, as a State agency, is not a public utility** as defined by § 62-3(23) and is not subject to the fee requirements of this section. See Opinion of Attorney General to LaVee Hamer, General Counsel, North Carolina Department of Correction, — N.C.A.G. — (October 17, 1994).

## ARTICLE 15.

## *Penalties and Actions.*

### § 62-313. Refusal to permit Commission to inspect records made misdemeanor.

Any public utility, its officers or agents in charge thereof, that fails or refuses upon the written demand of the Commission, or a majority of said Commission, and under the seal of the Commission, to permit the Commission, its authorized representatives or employees to examine and inspect its books, records, accounts and documents, or its plant, property, or facilities, as provided for by law, shall be guilty of a Class 3 misdemeanor. Each day of such failure or refusal shall constitute a separate offense and each such offense shall be punishable only by a fine of not less than five hundred dollars ($500.00) and not more than five thousand dollars ($5,000). (1963, c. 1165, s. 1; 1993, c. 539, s. 483; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 483, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-318. Allowing or accepting rebates a misdemeanor.

If any person shall participate in illegally pooling freights or shall directly or indirectly allow or accept rebates on freights, he shall be guilty of a Class 1 misdemeanor. (1879, c. 237, s. 2; Code, s. 1968; Rev., s. 3762; C.S., s. 3520; 1963, c. 1165, s. 1; 1993, c. 539, s. 484; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "Class 1 misdemeanor" for "misdemeanor and, upon conviction, shall be fined not less than one thousand dollars ($1,000) or imprisoned not less than 12 months".

## § 62-319. Riding on train unlawfully; venue.

If any person, with the intention of being transported free in violation of law, rides or attempts to ride on top of any car, coach, engine or tender, on any railroad in this State, or on the drawheads between cars, or under cars, on truss rods, or trucks, or in any freight car, or on a platform of any baggage car, express car or mail car on any train, he shall be guilty of a Class 3 misdemeanor. Any person charged with a violation of this section may be tried in any county in this State through which such train may pass carrying such person, or in any county in which such violation may have occurred or may be discovered. (1899, c. 625; 1905, c. 32; Rev., s. 3748; C.S., s. 3508; 1963, c. 1165, s. 1; 1993, c. 539, s. 485; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 485, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-320: Repealed by Session Laws 1995, c. 523, s. 30, effective July 29, 1995.

## § 62-322. Unauthorized manufacture or sale of switch-lock keys a misdemeanor.

It shall be unlawful for any person to make, manufacture, sell or give away to any other person any duplicate key to any lock used by any railroad company in this State on its switches or switch tracks, except upon the written order of that officer of such railroad company whose duty it is to distribute and issue switch-lock keys to the employees of such railroad company. Any person violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1909, c. 795; C.S., s. 3477; 1963, c. 1165, s. 1; 1993, c. 539, s. 487; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 487, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-323. Willful injury to property of public utility a misdemeanor.

If any person shall willfully do or cause to be done any act or acts whatever whereby any building, construction or work of any public utility, or any engine, machine or structure or any matter or thing appertaining to the same shall be stopped, obstructed, impaired, weakened, injured or destroyed, he shall be guilty of a Class 1 misdemeanor. (1871-2, c. 138, s. 39; Code, s. 1974; Rev., s. 3756; C.S., s. 3478; 1963, c. 1165, s. 1; 1993, c. 539, s. 488; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 488, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-325. Unlawful motor carrier operations.

(a) Any person, whether carrier, passenger, shipper, consignee, or any officer, employee, agent, or representative thereof, who shall knowingly offer, grant, or give or solicit, accept, or receive any rebate, concession, or discrimination in violation of any provision of this Chapter, or who by means of any false statement or representation, or by the use of any false or fictitious bill, bill of lading, receipt, voucher, roll, account, claim, certificate, affidavit, deposition, lease, or bill of sale, or by any other means or device, shall knowingly and willfully by any such means or otherwise fraudulently seek to evade or defeat regulations as in this Chapter provided for motor carriers, shall be deemed guilty of a Class 3 misdemeanor and upon conviction thereof only be fined not more than five hundred dollars ($500.00) for the first offense and not more than two thousand dollars ($2,000) for any subsequent offense.

(b) Any motor carrier, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this Article, or other applicable law, or to make specific and full, true, and correct answer to any question within 30 days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully neglect or fail to make true and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this Article to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a Class 3 misdemeanor and upon conviction thereof only be subject for each offense to a fine of not more than five thousand dollars ($5,000). As used in this subsection the words "kept" and "keep" shall be construed to mean made, prepared, or compiled, as well as retained. It shall be the duty of the Commission to prescribe and enforce such general rules and regulations as it may deem necessary to compel all motor carriers to keep accurate records of all revenue received by them to the end that any tax levied and assessed by the State of North Carolina upon revenues may be collected. Any agent or employee of a motor carrier who shall willfully and knowingly make a false report or record of fares, charges, or other revenue received by a carrier or collected in its behalf shall be guilty of a Class 1 misdemeanor.

(c) Any person who, at any bus terminal, solicits or otherwise attempts to induce any person to use some form of transportation for compensation other than that lawfully using said terminal premises by contract with the terminal operator or by valid order of the Commission shall be guilty of a Class 3 misdemeanor. (1947, c. 1008, s. 30; 1949, c. 1132, s. 30; 1953, c. 1140, s. 4; 1957, c. 1152, s. 16; 1961, c. 472, ss. 8, 11; 1963, c. 1165, s. 1; 1993, c. 539, s. 489; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 489, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-326. Furnishing false information to the Commission; withholding information from the Commission.

(a) Every person, firm or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall knowingly or willfully file or give false information to the Utilities Commission in any report, reply, response, or other statement or document furnished to the Commission shall be guilty of a Class 1 misdemeanor.

(b) Every person, firm, or corporation operating under the jurisdiction of the Utilities Commission or who is required by law to file reports with the Commission who shall willfully withhold clearly specified and reasonably obtainable information from the Commission in any report, response, reply or statement filed with the Commission in the performance of the duties of the Commission or who shall fail or refuse to file any report, response, reply or statement required by the Commission in the performance of the duties of the Commission shall be guilty of a Class 1 misdemeanor. (1969, c. 765, s. 1; 1993, c. 539, s. 490; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 490, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 62-327. Gifts to members of Commission, Commission employees, or public staff.

It shall be unlawful for any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company, to knowingly offer or make to any member of the Commission, Commission staff, or public staff, any gift of money, property, or anything of value. It shall be unlawful for any member of the Commission, Commission staff, or public staff to knowingly accept any gift of money, property, or anything of value from any officer, agent, employee, or attorney of any public utility or any public utility holding company, subsidiary, or affiliated company; provided, however, that it shall not be unlawful for members of the Commission, Commission staff, or public staff to attend public breakfasts, lunches, dinners, or banquets sponsored by such entities. Any person violating this section shall be guilty of a Class 3 misdemeanor and may only be fined in the discretion of the court; provided, further, that any member of the Commission staff, or member of the public staff violating this section shall also be subject to dismissal for cause. (1977, c. 468, s. 16; 1993, c. 539, s. 491; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 491, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# Chapter 62A.
# Public Safety Telephone Service.

Sec.
62A-12. Misuse of 911 system; penalty.

## § 62A-12. Misuse of 911 system; penalty.

Any person who intentionally calls the 911 number for other than purposes of obtaining public safety assistance commits a Class 1 misdemeanor. (1989, c. 587, s. 1; 1993, c. 539, s. 492; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 492, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# Chapter 63.

# Aeronautics.

**Article 2.**

**State Regulation.**

Sec.
63-18. Dangerous flying a misdemeanor.
63-23. Penalties.

**Article 3.**

**Stealing, Tampering with, or Operating Aircraft While Intoxicated.**

63-25. Taking of aircraft made crime of larceny.
63-26. Tampering with aircraft made crime.
63-26.1. Trespass upon airport property made a crime.
63-27. Operation of aircraft while impaired.
63-28. Infliction of serious bodily injury by operation of an aircraft while impaired.

**Article 4.**

**Model Airport Zoning Act.**

63-31. Adoption of airport zoning regulations.

Sec.
63-35. Enforcement and remedies.
63-37.1. Airport obstructions illegal.

**Article 6.**

**Public Airports and Related Facilities.**

63-53. Specific powers of municipalities operating airports.
63-56. Joint operation of airports.

**Article 7.**

**State and Federal Aid; Authority of Department of Transportation.**

63-67. Activities eligible for State aid.
63-68. Limitations on State financial aid.
63-73. Letting of contracts.

**Article 9.**

**Changes in Special Use Airspaces.**

63-90. Public purpose declared.
63-91. General Assembly review and approval.
63-92. Effect of General Assembly review.

## ARTICLE 1.

## *Municipal Airports.*

### § 63-1. Definitions; singular and plural.

CASE NOTES

**Cited** in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280 (1987).

### § 63-4. Joint airports established by cities, towns and counties.

**Local Modification.** — City of Laurinburg and Town of Maxton: 1993, c. 414, s. 10.

For additional local modifications to this section, see the main pamphlet.

## ARTICLE 2.

## *State Regulation.*

### § 63-12. Ownership of space.

CASE NOTES

**Purpose of this section** was to subject the common-law rights recognized and described therein to the right of flight established in § 63-13, not to prohibit a conveyance of air rights independent of the land beneath. Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987).

### § 63-15. Collision of aircraft.

CASE NOTES

**Cited** in First Fin. Sav. Bank, Inc. v. American Bankers Ins. Co., 783 F. Supp. 963 (E.D.N.C. 1991).

### § 63-18. Dangerous flying a misdemeanor.

Any airman or passenger who, while in flight over a thickly inhabited area or over a public gathering within this State, shall engage in trick or acrobatic flying, or in any acrobatic feat, or shall except while in landing or taking off, fly at such a low level as to disturb the public peace or the rights of private persons in the enjoyment of their homes, or injure the health, or endanger the persons or property on the surface beneath, or drop any object except loose water or loose sand ballast, shall be guilty of a Class 1 misdemeanor. (1929, c. 190, s. 9; 1947, c. 1001, s. 2; 1971, c. 936, s. 3; 1993, c. 539, s. 493; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 493, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 63-20. Qualifications of operator; federal license.

CASE NOTES

**Applicability of Federal Regulation Placing Responsibility on Pilot.** — The federal regulation that the pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft is made applicable to all flights in North Carolina by state statute. No in-flight negligence of the pilot can be imputed to the passengers who chartered the plane. Nothing short of physical interference with the pilot's operation of the plane would remove the pilot from actual control. Haley v. United States, 654 F. Supp. 481 (W.D.N.C.), aff'd, 829 F.2d 1120 (4th Cir. 1987).

**Cited** in Bolick v. Sunbird Airlines, 96 N.C. App. 443, 386 S.E.2d 76 (1989).

## § 63-23. Penalties.

A person who violates any provision of G.S. 63-20, 63-21 or 63-22 of this Article shall be guilty of a Class 2 misdemeanor; provided, however, that acts or omissions made unlawful by G.S. 63-20, 63-21 or 63-22 of this Article shall not be deemed to include any act or omission which violates the laws or lawful regulations of the United States. (1929, c. 190, s. 14; 1993, c. 539, s. 494; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 494, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## Article 3.

## *Stealing, Tampering with, or Operating Aircraft While Intoxicated.*

## § 63-25. Taking of aircraft made crime of larceny.

Any person who, under circumstances not constituting larceny shall, without the consent of the owner, take, use or operate or cause to be taken, used or operated, an airplane or other aircraft or its equipment, for his own profit, purpose or pleasure, steals the same, is guilty of a Class H felony. (1929, c. 90, s. 1; 1993, c. 539, s. 1278; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, substituted "a Class H felony" for "larceny and is punishable accordingly".

## § 63-26. Tampering with aircraft made crime.

Any person who shall, without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft, or any personal property under the control of or being used by any public or private airport or aircraft landing facility shall be guilty of a Class 1 misdemeanor, and the showing of willful or malicious intent shall not be necessary to sustain a conviction hereunder. (1929, c. 90, s. 2; 1987, c. 818, s. 3; 1993, c. 539, s. 495; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 495, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 63-26.1. Trespass upon airport property made a crime.

(a) It shall be unlawful for any person to trespass upon airport property. For purposes of this section "airport property" means property that is under the control of or is being used by any public or private airport or aircraft landing facility.

(b) A person commits the offense of trespass upon airport property if, without authorization, he enters or remains on airport property that is so enclosed or posted or secured as to demonstrate clearly an intent to keep out intruders. Violation of this section is a Class 2 misdemeanor. (1987, c. 818, s. 4; 1993, c. 539, s. 496; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1987, c. 818, s. 5 made this section effective October 1, 1987.

Session Laws 1993, c. 539, s. 496, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 63-27. Operation of aircraft while impaired.

(a) Offense. — A person commits the offense of operation of an aircraft while impaired if he operates an aircraft, whether on the ground or in the air or on water, within this State:

(1) While under the influence of an impairing substance; or
(2) After having consumed sufficient alcohol that he has, at any relevant time after the operating of an aircraft, an alcohol concentration of 0.04 or more.

The relevant definitions contained in G.S. 20-4.01 shall apply to this section.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for operating an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant operated the aircraft within this State while subject to an impairing substance.

(d) Chemical Analysis. — Any person who operates an airplane or other aircraft, whether on the ground or in the air or on the water within the territorial limits of this State gives consent to chemical analysis if he is charged with the offense of operating an aircraft while impaired. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when he has reasonable grounds to believe that the person charged has committed the specified crime. The chemical analysis shall be performed pursuant to the procedures established under Chapter 20 of the General Statutes applying to motor vehicle violations with the exception that if the person charged refuses to be tested, the charging officer shall, in writing, notify the local office of the Federal

Aviation Administration of the individual's refusal. The results of any chemical tests administered pursuant to this section will be admissible into evidence at trial on the offense charged and a written report of the test results shall be made available to the local office of the Federal Aviation Administration.

(e) Punishment. — A person violating this section shall be guilty of a Class 1 misdemeanor. Provided, however, for a second and all subsequent convictions of this section, a person shall be guilty of a Class I felony. (1929, c. 90, s. 3; 1953, c. 675, s. 8; 1987, c. 818, s. 1; 1993, c. 539, ss. 497, 1279; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, ss. 497, 1279, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 63-28. Infliction of serious bodily injury by operation of an aircraft while impaired.

(a) Offense. — A person commits the offense of infliction of serious bodily injury by operation of an aircraft while impaired if, while in violation of G.S. 63-27, he does serious bodily injury to another.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for infliction of serious bodily injury by operation of an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant did serious bodily injury to another while operating an aircraft within this State while subject to an impairing substance.

(d) Punishment. — Violation of this section is a Class F felony. (1929, c. 90, s. 4; 1953, c. 675, s. 9; 1987, c. 818, s. 2; 1993, c. 539, s. 1280; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 1280, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 4.

## *Model Airport Zoning Act.*

## § 63-31. Adoption of airport zoning regulations.

(a) Every political subdivision may adopt, administer, and enforce, under the police power and in the manner and upon the conditions hereinafter prescribed, airport zoning regulations, which regulations shall divide the area surrounding any airport within the jurisdiction of said political subdivision into zones, and, within such zones, specify the land uses permitted, and regulate and restrict the height to which structures and trees may be erected or allowed to grow. In adopting or revising any such zoning regulations, the political subdivision shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the federal government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport.

(b) In the event that a political subdivision has adopted, or hereafter adopts, a general zoning ordinance regulating, among other things, the height of buildings, any airport zoning regulations adopted for the same area or portion thereof under this Article may be incorporated in and made a part of such general zoning regulations, and be administered and enforced in connection therewith, but such general zoning regulations shall not limit the effectiveness or scope of the regulations adopted under this Article.

(c) Any two or more political subdivisions may agree, by ordinance duly adopted, to create a joint board and delegate to said board the powers herein conferred to promulgate, administer and enforce airport zoning regulations to protect the aerial approaches of any airport located within the corporate limits of any one or more of said political subdivisions. Such joint board shall have as members two representatives appointed by the chief executive officer of each political subdivision participating in the creation of said board and a chairman elected by a majority of the members so appointed.

(d) The jurisdiction of each political subdivision is hereby extended to the promulgating, adopting, administering and enforcement of airport zoning regulations to protect the approaches of any airport or landing field which is owned by said political subdivision, although the area affected by the zoning regulations may be located outside the corporate limits of said political subdivision. In case of conflict with any airport zoning or other regulations promulgated by any political subdivision, the regulations adopted pursuant to this section shall prevail.

(e) All airport zoning regulations adopted under this Article shall be reasonable, and none shall require the removal, lowering, or other change or alteration of any structure or tree not conforming to the regulations when adopted or amended, or otherwise interfere with the continuance of any nonconforming use, except as provided in G.S. 63-32, subsection (a).

(f) A political subdivision may not adopt an airport zoning regulation in violation of G.S. 63A-18. (1941, c. 250, s. 3; 1945, cc. 300, 635; 1991, c. 749, s. 3.)

## § 63-35. Enforcement and remedies.

Each violation of this Article or of any regulations, order, or ruling promulgated or made pursuant to this Article, shall constitute a Class 3 misdemeanor, and each day a violation continues to exist shall constitute a separate offense. In addition, the political subdivision within which the property is located may institute in any court of competent jurisdiction, an action to prevent, restrain, correct or abate any violation of this Article, or of airport zoning regulations adopted under this Article, or of any order or ruling made in connection with their administration or enforcement, and the court shall adjudge to the plaintiff such relief, by way of injunction (which may be mandatory) or otherwise, as may be proper under all the facts and circumstances of the case, in order fully to effectuate the purposes of this Article and of the regulations adopted and orders and rulings made pursuant thereto. (1941, c. 250, s. 7; 1993, c. 539, s. 498; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 498, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 63-37.1. Airport obstructions illegal.

Any person, other than the owner or operator of an airport, who intentionally obstructs the lawful takeoff and landing operations and patterns of aircraft at an existing public or private airport shall be guilty of a Class 1 misdemeanor. (1995, c. 507, s. 19.5(m).)

**Editor's Note.** — Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Session Laws 1995, c. 507, s. 19.5(q), provides that this section is effective December 1, 1995, and is applicable to offenses committed on or after that date.

## ARTICLE 6.

## *Public Airports and Related Facilities.*

## § 63-53. Specific powers of municipalities operating airports.

In addition to the general powers in this Article conferred, and without limitation thereof, a municipality which has established or may hereafter establish airports, restricted landing areas or other air navigation facilities, or which has acquired or set apart or may hereafter acquire or set apart real property for such purpose or purposes is hereby authorized:

(1) To vest authority for the construction, enlargement, improvement, maintenance, equipment, operation and regulation thereof in an officer, a board or body of such municipality by ordinance or resolution which shall prescribe the powers and duties of such officer, board or body. The expense of such construction, enlargement, improvement, maintenance, equipment, operation and regulation shall be a responsibility of the municipality.

(2) To adopt and amend all needful rules, regulations and ordinances for the management, government and use of any properties under its control whether within or without the territorial limits of the municipality; to appoint airport guards or police with full police powers; to fix by ordinance, penalties for the violation of said ordinances and enforce

said penalties in the same manner in which penalties prescribed by other ordinances of the municipality are enforced. It may also adopt ordinances designed to safeguard the public upon or beyond the limits of private airports or landing strips within such municipality or its police jurisdiction against the perils and hazards of instrumentalities used in aerial navigation. Such ordinances shall be published as provided by general law or the charter of the municipality for the publication of similar ordinances. They must conform to and be consistent with the laws of this State and shall be kept in conformity, as nearly as may be, with the then current federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto.

(3) To lease such airports or other air navigation facilities, or real property acquired or set apart for airport purposes, to private parties, to any municipal or State government or to the national government, or to any department of either thereof, for operation; to lease to private parties, to any municipal or State government or to the national government, or any department of either thereof, for operation or use consistent with the purpose of this Article, space, area, improvements, or equipment on such airports; to sell any part of such airports, other air navigation facilities or real property to any municipal government, or to the United States or to any department or instrumentality thereof, for aeronautical purposes or purposes incidental thereto, and to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided that in each case in so doing the public is not deprived of its rightful, equal, and uniform use thereof.

(4) To sell or lease any property, real or personal, acquired for airport purposes and belonging to the municipality, which, in the judgment of its governing body, may not be required for aeronautic purposes in accordance with the laws of this State or the provisions of the charter of the municipality governing the sale or leasing of similar municipally owned property.

(5) To determine the charge or rental for the use of any properties under its control and the charges for any services or accommodations and the terms and conditions under which such properties may be used, provided that in all cases the public is not deprived of its rightful, equal, and uniform use of such property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality. The municipality shall have and may enforce liens as provided by law for liens and enforcement thereof, for repairs to or improvement or storage or care of any personal property, to enforce the payment of any such charges.

(6) To engage, on an airport, in commercial and industrial land development projects which relate to, develop, or further airborne commerce and cargo and passenger traffic, and, in connection with any project, to improve real estate on an

airport and lease that improved real estate to public or private commercial and industrial enterprises, or contract with others to do so.

(7) To exercise all powers necessarily incidental to the exercise of the general and special powers herein created. (1945, c. 490, s. 6; 1991, c. 501, s. 1.)

**Local Modification.** — Goldsboro-Wayne Airport Authority: 1987 (Reg. Sess., 1988), c. 1006. s. 5.

For additional local modifications to this section, see the main pamphlet.

**Editor's Note.** — Session Laws 1991, c. 501, s. 2 provides: "This act provides additional powers and shall not be regarded as limiting powers conferred by other laws."

Session Laws 1991, c. 501, s. 3 is a severability clause.

## § 63-56. Joint operation of airports.

(a) All powers, rights and authority granted to any municipality in this Article may be exercised and enjoyed by two or more municipalities either within or without the territorial limits of either or any of said municipalities and within or without this State, or by any municipality acting jointly with any other municipality therein either within or without this State, provided the laws of such other state permit such joint action.

(b) Any two or more municipalities may enter into agreements with each other, duly authorized by ordinance or resolution, as may be appropriate, for joint action pursuant to the provisions of this section. Concurrent action by the governing bodies of the municipalities involved shall constitute joint action.

(c) Each such agreement shall specify its terms; the proportionate interest which each municipality shall have in the property, facilities and privileges involved, and the proportion of preliminary costs, costs of acquisition, establishment, construction, enlargement, improvement and equipment, and of expenses of maintenance, operation and regulation to be borne by each, and make such other provisions as may be necessary to carry out the provisions of this section. It shall provide for amendments thereof and for conditions and methods of termination; for the disposition of all or any part of the property, facilities and privileges jointly owned if said property, facilities and privileges, or any part thereof, shall cease to be used for the purposes herein provided or if the agreement shall be terminated, and for the distribution of the proceeds received upon any such disposition, and of any funds or other property jointly owned and undisposed of, and the assumption or payment of any indebtedness arising from the joint venture which remains unpaid, upon any such disposition or upon a termination of the agreement.

(d) Municipalities acting jointly as herein authorized may create a board from the inhabitants of such municipalities for the purpose of acquiring property for establishing, constructing, enlarging, improving, maintaining, equipping, operating and regulating the airports and other air navigation facilities and airport protection privileges to be jointly acquired, controlled, and operated. Such board shall consist of members to be appointed by the governing body of each municipality involved, the number to be appointed by each to be provided for by the agreement for the joint venture. Each member shall serve for such time and upon such terms and as to compensation, if any, as may be provided for in the agreement.

(e) Each such board shall organize, select officers for terms to be fixed by the agreement, and adopt and from time to time amend rules of procedure.

(f) Such board may exercise, on behalf of the municipalities acting jointly by which it is appointed, all the powers of each of such municipalities granted by this Article, except as herein provided, subject, however, to such limitations as may be contained in the agreement between such municipalities. Real property, airports, restricted landing areas, air protection privileges, or personal property costing in excess of a sum to be fixed by the joint agreement, may be acquired, and condemnation proceedings may be instituted, only by authority of the governing bodies of each of the municipalities involved. The total amount of expenditures to be made by the board for any purpose in any calendar year shall be determined by the municipalities involved by the approval by each. No real property and no airport, other air navigation facility, or air protection privilege, owned jointly, shall be disposed of by the board, by sale, or otherwise, except by authority of the appointed governing bodies, but the board may lease space, area or improvements and grant concessions on airports for aeronautical purposes or purposes incidental thereto.

(g) Each municipality is authorized and empowered to enact such ordinances as are provided for by this Article, and to fix by such ordinances penalties for the violation thereof, which ordinances shall have the same force and effect within the municipality which enacted them, and on any property controlled by it, either separately or jointly with another municipality, or adjacent thereto, whether within or without the territorial limits of it, or either or any of them, as ordinances of the municipality involved, and may be enforced in such municipality in like manner as are its other ordinances.

(h) Condemnation proceedings may be instituted in the names of two or more municipalities jointly, and the property acquired by such joint condemnation proceedings shall be held by the municipalities as tenants in common, each municipality being entitled to a pro rata interest in said property as the value of its contribution to the acquisition of said property bears to the total cost of acquiring said property, and in the event one municipality desires to acquire property for expansion of or addition to the facilities, and the other or others do not elect to join in the acquisition of such property, such municipality may institute condemnation proceedings in its name individually, and all property now owned or hereafter acquired by a municipal corporation for additions to or expansions of aeronautical facilities operated jointly shall be and remain the sole property of the municipal corporation acquiring same.

(i) For the purpose of providing funds for necessary expenditures in carrying out the provisions of this section, a joint fund shall be created and maintained, into which each of the municipalities involved shall deposit its proportionate share as provided by the joint agreement, and into which shall be paid the revenues obtained from the ownership, control and operation of the airports and other air navigation facilities jointly controlled.

(j) All disbursements from such fund shall be made by order of the board, subject, however, to such limitations as shall be contained in the agreement between such municipalities.

(k) Specific performance of the provisions of any joint agreement entered into as provided for in this section may be enforced as against any party thereto by the other party or parties thereto.

(*l*) In the event any property is now held or may hereafter be acquired by two or more municipalities for aeronautical purposes, and such municipalities do not agree upon the terms of an agreement, as heretofore provided, and shall not agree to create a board as heretofore provided, then and in that event a board of not less than five nor more than seven members shall be created from the inhabitants of such municipalities, each municipality being entitled to appoint as nearly as possible the proportionate number of representatives on said board as the value of its contribution shall bear to the entire amount of money or property so held by such municipalities for aeronautical purposes. In determining the value of the contribution of any municipality, the value of any funds or property used for the development of said property or the building of facilities on said property shall be taken into consideration.

(m) The said board shall have all powers given by this Article to boards created by agreements between municipalities, provided, however, that any funds appropriated by a municipality and turned over to the board for aeronautical purposes shall only be used for these purposes designated by the municipality furnishing such funds.

(n) The actions of such board shall be determined by a majority vote of the members thereof, and a majority of the members shall constitute a quorum for any meeting of the board, and such boards so created shall have full control of all revenues received by reason of the airport or other aeronautical facilities, and shall have power to expend all sums so received for such aeronautical purposes as the board deems proper, and pay over any surplus to municipalities in proportion to their respective interests.

(o) In the event the aeronautical facilities or any part thereof shall cease to be used for aeronautical purposes, such of the facilities as are jointly owned by two or more municipalities shall be sold, and each municipality shall receive its pro rata proportion of the sums realized from the sale of facilities jointly owned.

(p) In the event aeronautical facilities are now owned or hereafter acquired by two or more municipalities, and are operated under a board as hereinabove provided, and one or more of such municipalities deem it advisable to expand or enlarge the facilities or invest more money in such facilities, all of the municipalities then having representation on the board shall be entitled, if they so desire, to contribute their pro rata part of such additional investment and maintain their pro rata representation on said board, provided, however, that if one or more of the municipalities involved shall fail to contribute its or their proportionate part of such additional investment, the representation of such municipality on such board shall be readjusted, to the end that the representation of each municipality on said board shall represent as nearly as possible its pro rata contribution to the entire investment.

Provided further that where one municipality at the time of the passage of this Article shall have invested more than one half of the total investment in a jointly owned airport, then, and in that event the minority owner or owners shall be allowed five years from the date of the passage of this Article in which to pay over to the majority owner a sum sufficient to equalize the amount of ownership of the present minority owner or owners with the total ownership of the majority owner. Provided further that this Article shall not be construed to amend or impair in any respect contracts or agreements in effect at the time of the adoption of this Article.

(q) In the case of an airport board or commission authorized by agreement between two cities, as defined in G.S. 160A-1(2), pursuant to this section, one of which is located partially but not wholly in the county in which the jointly owned airport is located, and where the board or commission provided water and wastewater services off the airport premises before January 1, 1995, the board or commission shall have the authority to acquire, construct, establish, enlarge, improve, maintain, own, operate and contract for the operation of water supply and distribution systems and wastewater collection, treatment and disposal systems of all types, on and off the airport premises. In no event, however, shall such a board or commission be held liable for damages to those off the airport premises for failure to provide such water or wastewater services. (1945, c. 490, s. 9; 1995 (Reg. Sess., 1996), c. 644, s. 1.)

**Effect of Amendments.** — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, added subsection (q).

## ARTICLE 7.

## *State and Federal Aid; Authority of Department of Transportation.*

### § 63-67. Activities eligible for State aid.

Loans and grants of State funds may be made for the planning, acquisition, construction, or improvement of any airport, seaplane base, or heliport owned or controlled, or which will be owned or controlled by any city, county or public airport authority acting by itself or jointly with any other city or county. An airport, seaplane base, or heliport development project or activity eligible for State aid under this Article shall also be deemed to include projects such as air navigation facilities, aviation easements, and the acquisition of land, lighting, marking, security items, terminal improvements, and the elimination of aviation safety hazards, and the preservation or enhancement of essential air service as defined by the Federal Aviation Act of 1958, as amended. (1967, c. 1006, s. 1; 1973, c. 1443, s. 2; 1977, 2nd Sess., c. 1219, s. 39.1; 1979, c. 148, s. 5; 1987 (Reg. Sess., 1988), c. 1086, s. 164.)

**Editor's Note.** — Session Laws 1987 (Reg. Sess., 1988), c. 1086, s. 172 is a severability clause.

### § 63-68. Limitations on State financial aid.

Grants and loans of funds authorized by this Article shall be subject to the following conditions and limitations:

(1) Loans and grants may be for such projects, activities, or facilities as would in general be eligible for approval by the Federal Aviation Administration or its successor agency or agencies with the exception that the requirement that the airport be publicly owned shall not be applicable. Further, airport terminal and security areas, seaplane bases, and heliports are also eligible for State financial aid.

(2) Loans and grants of State funds shall be limited to a maximum of fifty percent (50%) of the nonfederal share of the total cost of any project for which aid is requested, and shall be made only for the purpose of supplementing such other funds, public or private, as may be available from federal or local sources provided, however, using one hundred percent (100%) State funding in its discretion the Department of Transportation may purchase, install and maintain navigational aids necessary for the safe, efficient use of airspace and may conduct other projects or programs to improve the safety and planning of the air transportation system, including but not limited to, marking serviceable runways and taxiways. Further, the Department of Transportation may contract out the maintenance and installation of state-owned navigational aids when necessary and may give or transfer such aids to the Federal Aviation Administration.

(3) Loans and grants of State funds shall be made from General Assembly appropriations specifically designated for aviation improvement, and from no other source. The Department of Transportation may utilize the State Aviation Grant Funds to cover the direct and indirect costs of administering airport grant projects, other services authorized by this Article including planning, and the costs of services provided by nonadministrative Department of Transportation divisions or other State agencies in connection with these projects.

(4) Notwithstanding the provisions of this section or G.S. 63-67, the Department of Transportation may allow up to ten percent (10%) of State aviation grant funds to be used for maintenance on General Aviation and Air Carrier Airports having a Department of Transportation approved maintenance plan on a seventy-five percent (75%) local — twenty-five percent (25%) State basis.

(5) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to eighty percent (80%) of the nonfederal share of the total cost of the development of new or unpaved publicly owned airports identified in the North Carolina Airport System Plan, provided that such funding shall be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road. Electronic navigational aids, terminal buildings, access taxiways, and other items eligible for State airport aid at the rate of fifty percent (50%) of the nonfederal share of project cost shall not be eligible for the foregoing eighty percent (80%) State funding, even though constructed as part of the initial airport development.

(6) Notwithstanding the provisions of this section, the Department of Transportation may allow loans and grants of State funds up to ninety percent (90%) of the total cost of the development of new or unpaved publicly owned rural airports identified in the North Carolina Airport System Plan and receiving no federal funding. Such State funding shall

be limited to land acquisition, site preparation, basic runway, taxiway, and apron system construction, together with associated lighting and navigational aids, and construction of the primary airport access road.

The Department of Transportation shall develop rules and regulations to define rural airports. (1967, c. 1006, s. 1; 1969, c. 293; 1973, c. 1262, s. 28; c. 1443, s. 3; 1975, c. 716, s. 3; 1977, 2nd Sess., c. 1219, s. 39.2; 1979, c. 148, ss. 3, 5; c. 149; 1981, c. 1117, ss. 1, 2; 1983, c. 319; 1983 (Reg. Sess., 1984), c. 1094; 1985, c. 782; 1989, c. 636; 1991, c. 430, s. 1.)

**Editor's Note.** —

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 18, provides that, of the funds appropriated in the Continuation Budget Operations Appropriations Act of 1995 to the Department of Commerce for allocation to the Northeast North Carolina Regional Economic Development Commission, $125,000 in each fiscal year shall be transferred to the Department of Transportation for allocation as a local match for projects at the Northeastern Regional Airport in Edenton; that funds used as a local match shall be used for projects approved by the Northeastern Regional Airport Commission and included in the transportation improvement plan adopted by the Board of Transportation; and that the fund matching limitations in Article 7 of Chapter 63 of the General Statutes shall not apply to the funds used pursuant to this section.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 fiscal biennium."

## § 63-73. Letting of contracts.

All contracts that the Department of Transportation may let for construction, repair, maintenance or those services listed in 49 U.S.C. App. § 2210(a)(16) in furtherance of this Article shall be let in accordance with the provisions of G.S. 136-28.1. (1983 (Reg. Sess., 1984), c. 1033, s. 1; 1991, c. 430, s. 2.)

## ARTICLE 9.

## *Changes in Special Use Airspaces.*

## § 63-90. Public purpose declared.

It is the intent of the General Assembly that the legislative branch review and comment on all applications and actions of the Federal Aviation Administration concerning the creation of or changes in special use airspaces for aircraft operation over North Carolina. (1987, c. 494, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 494, s. 2 made this Article effective upon ratification and applicable to pending changes in ceilings. The act was ratified June 29, 1987.

## § 63-91. General Assembly review and approval.

The Division of Aviation of the Department of Transportation shall bring before the General Assembly or the Joint Legislative Commission on Governmental Operations all applications to the Federal Aviation Administration and all proposed rule changes by the Federal Aviation Administration for the creation of or changes in special use airspaces, including military operation areas and restricted areas for aircraft operation over North Carolina during the period for public comment. If the General Assembly is in session during that period, information on the pending application or rule change shall be presented to the standing Transportation Committees of the House of Representatives and the Senate. If the comment period occurs when the General Assembly is not in session then the Division of Aviation of the Department of Transportation shall bring the relevant information before the Joint Legislative Commission on Governmental Operations. The General Assembly or the Joint Legislative Commission on Governmental Operations will then review and comment on those applications. (1987, c. 494, s. 1.)

## § 63-92. Effect of General Assembly review.

(a) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position on the pending application or rule change when it submits the State's official position on the pending application or rule change.

(b) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is not in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position opposing the pending application or rule change when it submits the State's official position on the pending application or rule change. (1987, c. 494, s. 1.)

# Chapter 63A.

# North Carolina Global TransPark Authority.

Sec.
63A-9. Bonds and notes.
63A-23. Annual and quarterly reports.

## § 63A-9. Bonds and notes.

(a) The Authority may provide for the issuance, at one time or from time to time, of bonds and notes, including bond anticipation notes and renewal notes, of the Authority to carry out its corporate purposes including financing the costs of projects. The principal of and interest on the bonds or notes shall be payable from funds provided under this Chapter for their payment. A bond anticipation note may be made payable from the proceeds of bonds or renewal notes or, in the event bond or renewal note proceeds are not available, from any available Authority revenues or other funds provided for this purpose. Bonds and notes may also be paid from the proceeds of any credit facility.

All bonds, notes, or refunding bonds or notes of the Authority are subject to this section and G.S. 63A-10. All bonds, notes, or refunding bonds or notes to finance or refinance a special user project are also subject to G.S. 63A-11.

The bonds and notes of each issue shall be dated and may be made redeemable prior to maturity at the option of the Authority or otherwise, at one or more prices, on one or more dates, and upon the terms and conditions set by the Authority. The bonds or notes may also be made payable from time to time on demand or tender for purchase by the owner upon terms and conditions set by the Authority.

A bond or note shall bear interest at a rate or rates, including variable rates, as determined by the Local Government Commission with the approval of the Authority. A bond or note may be secured by a reserve fund created for that purpose and funded from proceeds of the bond or note, revenues, or any other source of funds available to the Authority.

(b) In fixing the details of bonds or notes, the Authority may provide that the bonds or notes may:

(1) Be payable from time to time on demand or tender for purchase by the owner of the bond or note if a credit facility supports the bond or note, unless the Local Government Commission specifically determines that a credit facility is not required because the absence of a credit facility will not materially and adversely affect the financial position of the Authority and the marketing of the bonds or notes at a reasonable interest cost to the Authority.

(2) Be additionally supported by a credit facility.

(3) Be made subject to redemption or a mandatory tender for purchase prior to maturity.

(4) Be capital appreciation bonds.

(5) Bear interest at a rate or rates that may vary, including variations permitted pursuant to a par formula.

(6) Be made the subject of a remarketing agreement whereby an attempt is made to remarket the bonds or notes to new

purchasers prior to their presentment for payment to the provider of the credit facility or to the Authority.

(c) Notes and bonds shall mature at the times determined by the Authority, not to exceed 40 years from the date of issue. The Authority shall determine the form and manner of execution of a bond or note, including any interest coupons to be attached to the bond or note. The Authority shall fix the denominations and places of payment of principal and interest of the bond or note. The principal of and interest on a bond or note may be paid at any bank or trust company, whether located inside or outside the United States of America.

(d) The validity of a bond, note, or coupon that has the signature or facsimile signature of a person who was an officer when the bond, note, or coupon was signed or the facsimile signature attached but who is not that officer when the bond, note, or coupon is delivered is not affected by the change in officers. A bond, note, or coupon may bear the signature or facsimile signature of a person who will be the proper officer to sign the bond, note, or coupon when it is executed but who is not the officer on the date of the bond, note, or coupon.

(e) The Authority may provide for any of the following:

(1) Authentication of a bond or note by a trustee or other authenticating agent.

(2) Issuance of a bond or note as a certificated obligation, an uncertificated obligation, or both.

(3) Issuance of a bond or note in coupon form, in registered form, or both.

(4) Registration of a coupon bond or note as to principal alone or as to both principal and interest.

(5) The reconversion of a bond or note registered as to both principal and interest into a coupon bond or note.

(6) The interchange of registered and coupon bonds or notes.

(7) A system for registration in accordance with Chapter 159E of the General Statutes.

(8) Replacement of a bond or note that has been mutilated, lost, or destroyed.

(f) The Authority may not issue a bond or note under this Chapter, other than an obligation permitted under G.S. 63A-4(a)(22), unless its issuance is approved by the Local Government Commission, and it is sold by the Local Government Commission. To obtain approval of a bond or note, the Authority shall file an application for approval with the Local Government Commission. The application shall contain the information required by the Local Government Commission.

In determining whether to approve a proposed bond or note issue of the Authority, the Local Government Commission shall consider the following:

(1) For bonds or notes to finance airport projects, the criteria for its approval of revenue bonds under G.S. 159-86.

(2) For bonds or notes to finance special user projects, the criteria used for its approval of industrial bonds under G.S. 159C-8.

(3) The effect of the proposed financing upon any proposed or scheduled sale of obligations by the State, another State agency, or a unit of local government.

The Local Government Commission shall approve the proposed bond or note issue if it determines that the proposed financing for the issue meets the criteria and will effect the purposes of this Chapter.

When the Local Government Commission approves a bond or note issue of the Authority, the Authority may submit a written request to the Local Government Commission to sell the approved bonds or notes. Upon receiving a written request, the Local Government Commission shall consult with the Authority on the manner in which the bonds or notes will be sold and the price or prices at which the bonds or notes will be sold. With the approval of the Authority, the Local Government Commission shall sell the bonds or notes either at public or private sale in the manner and at the prices determined to be in the best interest of the Authority and to effect the purposes of this Chapter.

Bonds or notes may be issued under this Chapter without obtaining, except as otherwise expressly provided in this Chapter, the consent of any department, division, commission, board, body, bureau, or other agency of the State or without any other proceedings or conditions except as specifically authorized by this Chapter or by the provisions of the resolution authorizing the issuance of, or any trust agreement securing, the bonds or notes.

(g) Each bond or note that is represented by an instrument shall contain a statement signed by the Secretary of the Local Government Commission, or an assistant designated by the Secretary, certifying that the issuance of the bond or note has been approved under this Chapter. The signature may be a manual signature or a facsimile signature, as determined by the Local Government Commission. Each bond or note that is not represented by an instrument shall be evidenced by a writing relating to the obligation that identifies the obligation or the issue of which it is a part, contains the signed statement certifying approval of the Local Government Commission that is required on an instrument, and is filed with the Local Government Commission. A certification of approval by the Local Government Commission is conclusive evidence that a bond or note complies with this Chapter.

(h) The proceeds of a bond or note shall be used solely for the purposes for which the bond or note was issued and shall be disbursed in accordance with the resolution authorizing the issuance of the bond or note and with any trust agreement securing the bond or note.

(i) Prior to the preparation of definitive bonds, the Authority may issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when the bonds have been executed and are available for delivery.

(j) The Authority may secure a bond or note issued under this Chapter by a trust agreement between the Authority and a corporate trustee. The corporate trustee may be any trust company or bank having the powers of a trust company inside or outside the State. The Authority may secure a bond or note issued under this Chapter by a deed of trust. The trustee of the deed of trust may be an individual who is a resident of the State. A bank or trust company that is incorporated in this State and is a depository of the proceeds of obligations, revenues, or other money of an Authority may furnish indemnifying bonds or pledge securities required by the Authority.

The pledge of any assets, income, or revenues of the Authority to the payment of the principal of or the interest on any obligations of the Authority is binding from the time the pledge is made, and any assets, income, or revenues of the Authority are immediately subject to the lien of the pledge without any physical delivery or other act. The lien created by a pledge is binding against all persons who have claims of any kind against the Authority, regardless of whether they have notice of the lien.

(k) A resolution authorizing the issuance of a bond or note and a trust agreement securing a bond or note may provide that any moneys held under the resolution or trust agreement may be temporarily invested pending disbursement. Any officer with whom, or any bank or trust company with which, the moneys are deposited is considered a trustee of the moneys and must hold and apply the moneys for their stated purpose in accordance with this Chapter and the resolution or trust agreement. The Authority may invest any moneys, other than the proceeds of bonds issued to finance special user projects, as allowed in G.S. 147-69.1 for investments of the State Treasurer or in this subsection. The proceeds of bonds issued to finance special user projects may be invested as provided in the security document for the bonds.

In connection with or incidental to the acquisition or carrying of any investment relating to bonds, program of investment relating to bonds, or carrying of bonds, the Authority may, with the approval of the Local Government Commission, enter into a contract to place the investment or obligation of the Authority, as represented by the bonds, investment, or program of investment and the contract or contracts, in whole or in part, on an interest rate, currency, cash-flow, or other basis, including the following:

(1) Interest rate swap agreements, currency swap agreements, insurance agreements, forward payment conversion agreements, and futures.
(2) Contracts providing for payments based on levels of, or changes in, interest rates, currency exchange rates, or stock or other indices.
(3) Contracts to exchange cash flows or a series of payments.
(4) Contracts to hedge payment, currency, rate, spread, or similar exposure, including interest rate floors or caps, options, puts, and calls.

The Authority may enter a contract of this type in connection with, or incidental to, entering into or maintaining any agreement that secures bonds. A contract shall contain the payment, security, term, default, remedy, and other terms and conditions the Board considers appropriate. The Authority may enter a contract of this type with any person after giving due consideration, where applicable, of the person's credit-worthiness as determined by a rating by a nationally recognized rating agency or any other criteria the Board considers appropriate. In connection with, or incidental to, the issuance or carrying of bonds, or the entering of any contract described in this subsection, the Authority may enter into credit enhancement or liquidity agreements, with payment, interest rate, termination date, currency, security, default, remedy, and other terms and conditions as the Authority determines. Proceeds of bonds and any moneys set aside and pledged to secure payment of bonds or any of the contracts entered into under this subsection may be pledged to and used to service any of the contracts entered into under this section.

(*l*) Bonds and notes are exempt from all State, county, and municipal taxation or assessment, direct or indirect, general or special, whether imposed for the purpose of general revenue or otherwise, excluding inheritance and gift taxes, income taxes on the gain from the transfer of bonds and notes, and franchise taxes. The interest on bonds and notes is not subject to taxation as income.

(m) Bonds or notes issued under this Chapter shall not constitute a debt secured by a pledge of the faith and credit of the State or a political subdivision of the State and shall be payable solely from the revenues, income, or assets of the Authority that are pledged for their payment. The face of each bond or note issued shall contain a statement that the Authority is obligated to pay the bond or note or the interest on the bond or note only from the revenues, income, or assets pledged in payment of the bond or note and that neither the faith and credit nor the taxing power of the State or any political subdivision of the State is pledged in payment of the principal of or the interest on the bond or note.

(n) The State pledges to the holder of a bond or note issued under this Chapter that, as long as the bond or note is outstanding and unpaid, the State will not limit or alter the power the Authority had when the bond or note was issued in a way that impairs the ability of the Authority to produce revenues sufficient with other available funds to do all of the following:

(1) Maintain and operate the project for which the bond or note was issued.
(2) Pay the principal of, interest on, and redemption premium, if any, of the bond or note.
(3) Fulfill the terms of an agreement with the holder.

The State further pledges to the holder of a bond or note issued under this Chapter that the State will not impair the rights and remedies of the holder concerning the bond or note.

(o) Obligations issued under this Chapter are made securities in which all public officers and public bodies of the State and its political subdivisions, and all insurance companies, trust companies, banking associations, investment companies, executors, administrators, trustees, and other fiduciaries may properly and legally invest funds, including capital in their control or belonging to them. The obligations are made securities that may properly and legally be deposited with and received by any State or municipal officer or any agency or political subdivision of the State for any purpose for which the deposit of bonds, notes, or obligations of the State is now or may be authorized by law. (1991, c. 749, s. 1; 1991 (Reg. Sess., 1992), c. 1030, s. 16; 1995, c. 46, s. 2.)

**Editor's Note.** — Session Laws 1995, c. 46, s. 21 provided that this act became effective July 1, 1995, and applied to obligations issued on or after that date. See Effect of Amendment note for changes made by this act.

**Effect of Amendments.** — The 1995 amendment, effective July 1, 1995 and applicable to obligations issued on or after that date, in subsection (*l*), in the first sentence deleted "and their transfer, including any profit made on their sale" following "Bonds and notes", and added "income taxes on the gain from the transfer of bonds and notes, and franchise taxes" to the end of the sentence; and in the second sentence deleted "and the bonds and notes are not subject to taxation when constituting a part of the surplus of any bank, trust company, or other corporation" from the end. See Editor's note.

## § 63A-23. Annual and quarterly reports.

The Authority shall, promptly following the close of each fiscal year, submit an annual report of its activities for the preceding year to the Governor, the General Assembly, and the Local Government Commission. Each report shall be accompanied by an audit of its books and accounts. The audit shall be conducted by the State Auditor. The costs of all audits shall be paid from funds of the Authority.

The Authority shall submit quarterly reports to the Joint Legislative Commission on Governmental Operations. The reports shall summarize the Authority's activities during the quarter and contain any information about the Authority's activities that is requested by the Commission. (1991, c. 749, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 26.)

**Editor's Note.** — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

**Effect of Amendments.** — The 1996 Second Extra Session amendment, effective July 1, 1996, in the first paragraph, inserted the third sentence, and in the fourth sentence deleted "whether conducted by the State Auditor's staff or contracted with a private auditing firm" following "audits."

# Chapter 65.

# Cemeteries.

**Article 4.**

**Trust Funds for the Care of Cemeteries.**

Sec.
65-9. Funds to be kept perpetually.

**Article 9.**

**North Carolina Cemetery Act.**

65-47. Scope.
65-60.1. Trustees; qualifications; examination of records; enforcement.
65-64. Deposits to perpetual care fund.
65-66. Receipts from sale of personal property or services; trust account; penalties.

## ARTICLE 4.

## *Trust Funds for the Care of Cemeteries.*

### § 65-9. Funds to be kept perpetually.

All money placed in the office of the superior court clerk in accordance with this Article shall be held perpetually, or until such time as the balance of the trust corpus falls below one hundred dollars ($100.00), at which time the trust shall terminate and the clerk shall disburse the remaining balance as provided in G.S. 36A-147(c). Except as otherwise provided herein, no one shall have authority to withdraw or change the direction of the income on same. (1917, c. 155, s. 2; C.S., s. 5026; 1995, c. 225, s. 2.)

**Effect of Amendments.** — The 1995 amendment, effective October 1, 1995, and applicable to all cemetery trusts in existence before or created on or after that date, substituted the language beginning "or until such time" and ending "otherwise provided herein" for "and".

## ARTICLE 9.

## *North Carolina Cemetery Act.*

### § 65-47. Scope.

(a) The provisions of this Article shall apply to all persons engaged in the business of operating a cemetery as defined herein, except cemeteries owned and operated by governmental agencies or churches.

(b) Any cemetery beneficially owned and operated by a fraternal organization or its corporate agent for at least 50 years prior to September 1, 1975, shall be exempt from the provisions of Article 9 of this Chapter.

(c) The provisions of this Article shall not apply to persons licensed under Article 13D of Chapter 90 of the General Statutes when engaging in activities for which a license is required under the Article. (1975, c. 768, s. 1; 1977, c. 686, s. 1; 1995, c. 509, s. 135.1(i).)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, substituted "Article 13D of Chapter 90 of the General Statutes when engaging in activities for which a license is required under the Article" for "G.S. 65-36.1 through 65-36.8 when performing services or selling items for which a license is required under G.S. 65-36.1 through 65-36.8" in subsection (c).

## § 65-60.1. Trustees; qualifications; examination of records; enforcement.

(a) The term "corporate trustee" as used in this Article shall mean either a bank or trust company authorized to do business in North Carolina under the supervision of the Commissioner of Banks or any other corporate entity; provided that any corporate entity other than a bank or trust company which acts as trustee under this Article shall first be approved by the Cemetery Commission and shall be subject to supervision by the Cemetery Commission as provided herein.

(b) Any corporate entity, other than a bank or trust company, which desires to act as trustee for cemetery funds under this Article shall make application to the Commission for approval. The Commission shall approve the trustee when it has become satisfied that:

(1) The applicant employs and is directed by persons who are qualified by character, experience, and financial responsibility to care for and invest the funds of others.

(2) The applicant will perform its duties in a proper and legal manner and the trust funds and interest of the public generally will not be jeopardized.

(3) The applicant will act as trustee for cemetery funds which will exceed five hundred thousand dollars ($500,000) in the aggregate.

(4) The applicant is authorized to do business in North Carolina and has adequate facilities to perform its duties as trustee.

(c) Any trustee under this Article, other than a bank or trust company under the supervision of the Commissioner of Banks, shall maintain records relative to cemetery trust funds as the Commission may by regulation prescribe. The records shall be available at the trustee's place of business in North Carolina and shall be available at all reasonable times for examination by a representative of the Commission. The records shall be audited annually, within 90 days from the end of the trust fund's fiscal year, by an independent certified public accountant, and a copy of the audit report shall be promptly forwarded to the Commission.

(d) Whenever it appears that an officer, director, or employee of a trustee, other than a bank or trust company, is dishonest, incompetent, or reckless in the management of a cemetery trust fund, the Commission may bring an action in the courts to remove the trustee and to impound the property and business of the trustee as may be reasonably necessary to protect the trust funds.

(e) Any trustee shall invest and reinvest cemetery trust funds in the same manner as provided by law for the investment of trust funds by the clerk of the superior court; provided, however, that cemetery trust funds held in a fund designated as Trust Fund "A" pursuant to G.S. 65-64(e) may be invested and reinvested in accordance with G.S. 36A-2. (1977, c. 686, s. 15; 1979, c. 888, s. 9; 1995, c. 509, s. 135.3(a).)

**Effect of Amendments.** — The 1995 amendment, effective July 29, 1995, added "provided, however, that cemetery trust funds held in a fund designated as Trust Fund 'A' pursuant to G.S. 65-64(e) may be invested and reinvested in accordance with G.S. 36A-2" in subsection (e).

## § 65-64. Deposits to perpetual care fund.

(a) Deposits to the care and maintenance trust fund must be made by the cemetery company holding title to the subject cemetery lands on or before the last day of the calendar month following the calendar month in which final payment is received as provided herein; however the entire amount required to be deposited into the fund shall be paid within four years from the date of any contract requiring such payment regardless of whether all amounts have been received by the cemetery company. If the cemetery company fails to make timely deposit, the Commission may levy and collect a penalty of one dollar ($1.00) per day for each day the deposit is delinquent on each grave space, niche or mausoleum crypt sold. The care and maintenance trust fund shall be invested and reinvested by the trustee in the same manner as provided by law for the investment of other trust funds by the clerk of the superior court except that such investments may be made through means of a common trust fund as described in G.S. 36A-90; provided, further, that cemetery trust funds held in a fund designated as Trust Fund "A" pursuant to G.S. 65-64(e) may be invested and reinvested in accordance with G.S. 36A-2. The fees and other expenses of the trust fund shall be paid by the trustee from the net income thereof and may not be paid from the corpus. To the extent that the said net income is not sufficient to pay such fees and other expenses, the same shall be paid by the cemetery company.

(b) When a municipal, church-owned or fraternal cemetery converts to a private cemetery as defined in G.S. 65-48, then said cemetery shall establish and maintain a care and maintenance trust fund pursuant to this section; provided, however, the initial deposit for establishment of this trust fund shall be an amount equal to ten dollars ($10.00) per space for all spaces either previously sold or contracted for sale in said cemetery at the time of conversion or twenty-five thousand dollars ($25,000), whichever sum is greater.

(c) Repealed by 1991 (Regular Session, 1992), c. 1007, s. 35.

(d) In each sales contract, reservation or agreement wherein burial rights are priced separately, the purchase price of said burial rights shall be the only item subject to care and maintenance trust fund deposits; but if the burial rights are not priced separately therein, the full amount of the contract, reservations or agreement shall be subject to care and maintenance trust fund deposits as provided herein, unless the purchase price of said burial rights can be determined from the accounting records of the cemetery company.

(e) When the amount deposited in the perpetual care fund required by this Article of any cemetery company shall amount to one hundred fifty thousand dollars ($150,000), anything in this Article to the contrary notwithstanding, the cemetery company may make all deposits thereafter either into the original perpetual care trust fund or into a separate fund established as an irrevocable trust, designated as Perpetual Care Trust Fund "A," and invested by the trustee, in accordance with G.S. 36A-2, as directed by the cemetery company. Funds in a trust fund designated as Trust Fund "A" may not be invested in another cemetery company.

(f) For special endowments for a specific lot, grave, or a family mausoleum, memorial, marker, or monument, the cemetery may set aside the full amounts received for this individual special care in a separate trust or by a deposit to a savings account in a bank or savings and loan association located within and authorized to do business in the State; provided, however, if the licensee does not set up a separate trust or savings account for the special endowment the full amount thereof shall be deposited in Perpetual Care Trust Fund "A." (1943, c. 644, s. 10; 1957, c. 529, s. 4; 1967, c. 1009, s. 10; 1971, c. 1149, s. 5; 1975, c. 768, s. 1; 1977, c. 686, s. 14; 1979, c. 888, ss. 5, 6; 1987, c. 488, ss. 3, 6; 1991, c. 653, s. 6; 1991 (Reg. Sess., 1992), c. 1007, s. 35; 1995, c. 509, s. 135.3(b), (c).)

**Effect of Amendments.** — Session Laws 1995, c. 509, ss. 135.3(b) and (c), effective July 29, 1995, substituted "G.S. 36A-90; provided, further, that cemetery trust funds held in a fund designated as Trust Fund 'A' pursuant to G.S. 65-64(e) may be invested and reinvested in accordance with G.S. 36A-2" in subsection (a); and in subsection (e) inserted "in accordance with G.S. 36A-2" following "invested by the trustee", inserted "cemetery" preceding "company", and deleted "and are subject to the requirements of funds deposited in the original perpetual care trust fund" from the end.

## § 65-66. Receipts from sale of personal property or services; trust account; penalties.

(a) It shall be deemed contrary to public policy if any person or legal entity receives, holds, controls or manages funds or proceeds received from the sale of, or from a contract to sell, personal property or services which may be used in a cemetery in connection with the burial of or the commemoration of the memory of a deceased human being, where payments for the same are made either outright or on an installment basis prior to the demise of the person or persons so purchasing them or for whom they are so purchased, unless such person or legal entity holds, controls or manages said funds, subject to the limitations and regulations prescribed in this section. This section shall apply to all cemetery companies or other legal entities that offer for sale or sell personal property or services which may be used in a cemetery in connection with the burial of, or the commemoration of the memory of, a deceased human being, but shall exclude persons holding a license under Article 13D of Chapter 90 of the General Statutes.

(b) Any cemetery company or other entity entering into a contract for the sale of personal property or services, to be used in a cemetery in connection with disposing of, or commemorating the memory of a deceased human being wherein the use of the personal property or the furnishing of services is not immediately requested or required, shall comply with the following requirements and conditions:

(1) The cemetery company or other entity shall deposit an amount equal to sixty percent (60%) of all proceeds received on such contracts into a trust account, either in the form of an account governed by a trust agreement and handled by a corporate trustee or in the form of a passbook savings account, certificates of deposit for time certificates, and/or money-market certificates with a licensed and insured bank or savings institution located in the State of North Carolina until the amount deposited equals sixty percent (60%) of the actual sale price of the property or services

sold. Such accounts and/or deposits shall be in the name of the cemetery company or other entity in a form which will permit withdrawals only with the participation and consent of the Cemetery Commission as required by subdivision (4) of this subsection.

(2) All funds received on account of a contract for the sale of such personal property or services, whether the funds be received directly from the purchaser or from the sale or assignment of notes entered into by the purchase or otherwise, shall be deposited into the trust account as required by subdivision (1) of this section.

(3) All deposits required herein shall be made into the trust account so established on or before the last day of the month following receipt of the funds by the cemetery company or other entity.

(4) Withdrawals from a trust account may be made by the depositor, but only with the written approval of the Commission or officer or employee of the Commission authorized to act for the Commission. Withdrawals may be made only upon delivery of the merchandise or services for which the funds were deposited, cancellation of a contract, the presence of excess funds in the trust account, or under other circumstances deemed appropriate by the Commission. The Commission shall promulgate rules and regulations governing withdrawals from trust accounts, including time and frequency of withdrawals, notice to the Commission prior to withdrawals, the number and identity of persons other than the owner who are authorized by the owner to make withdrawals, the officers and employees of the Commission authorized to approve withdrawals, and any other matters necessary to implement the provisions of this subdivision. Withdrawals will not be allowed if the amount remaining in the trust account would fall below sixty percent (60%) of all proceeds received on account of contracts for the sale of such personal property or services.

(5) If for any reason a cemetery company or other entity who has entered into a contract for the sale of personal property or services cannot or does not provide the personal property or perform the services called for by the contract after request in writing to do so, the purchaser or his heirs or assigns or duly authorized representative shall be entitled to receive the entire amount paid on the contract and any income if any, earned thereon by the trust account.

(6) Every year after September 1, 1975, the cemetery company, the trustee or other entity shall within 75 days after the end of the calendar year, file a financial report of the trust funds with the Commission, setting forth the principal thereof, the investments and payments made, the income earned and disbursed; provided, however, that the Commission may require the cemetery, trustee, or other entity to make such additional financial reports as it may deem advisable.

(c) Whenever a contract for the sale of personal property and/or services allocates payments to apply to one item at a time under a specific schedule, the contract shall be considered divisible. Title to each item of personal property or the right to each item of services shall pass to the purchaser upon full payment for that item regardless of the remaining balance on other items under the same contract.

(d) Any contract for the sale of personal property and/or services shall state separate costs for each item of personal property, for each act of installation required by the contract, and for each other item of services included in the contract.

(e) All contracts for the sale of personal property and/or services must be printed in type size as required by the Truth in Lending Act, 15 U.S.C. § 1601 et seq., and regulations adopted pursuant to that act.

(f) In the event of prepayment, interest charged shall be no more than the interest earned on the unpaid balance computed on a percent per month basis for each month or part of a month up to the date of final payment. Any excess interest which has been paid by the purchaser must be refunded to him, his assigns, or his representative within 30 days after the final payment. No penalty or additional charge for prepayment may be required.

(g) In lieu of the deposits required under subsection (b) of this section, the cemetery company or other entity may post with the Commission a good and sufficient performance bond by surety company licensed to do business in North Carolina and in an amount sufficient to cover all payments made directly or indirectly by or on account of purchasers who have not received the purchased property and services. Money received from the sale or assignment of notes entered into by the purchasers, or otherwise, shall be treated as payments made by the purchasers.

(h) The Commission shall have the power and is required from time to time as it may deem necessary to examine the business of any cemetery company or other entity writing contracts for the sale of the property or services as herein contemplated. The written report of such examination shall be filed in the office of the Commission. Any person or entity being examined shall produce the records of the company needed for such examination.

(i) Any provision of any contract for the sale of the personal property or the performance of services herein contemplated under which the purchaser or beneficiary waives any of the provisions of this section shall be void.

(j) Repealed by Session Laws 1991, c. 653, s. 7.

(k) Nothing in this section shall apply to persons or legal entities holding licenses under Article 13D of Chapter 90 of the General Statutes when engaging in activities for which a license is required under that Article.

(*l*) If any report is not received within the time stipulated by the Commission or herein, the Commission may levy and collect a penalty of twenty-five dollars ($25.00) per day for each day of delinquency.

(m) Within 30 days following the execution of a contract for the sale of personal property or performance of services, a purchaser may cancel his contract by giving written notice to the seller. The seller may cancel the contract, upon default by purchaser, by giving written notice to the purchaser. Within 30 days of notice of cancellation, the cemetery company or other entity shall refund to purchaser the principal amount on deposit in the trust account for his benefit on any undelivered merchandise or services. This amount (no other obligations owed the purchaser by the seller) shall constitute the purchaser's entire entitlements under the contract. The seller may not terminate the contract without complying with this subsection. (1975, c. 768, s. 1; 1979, c. 888, s. 7; 1987, c. 488, s. 7; 1991, c. 653, s. 7; 1995, c. 509, s. 135.1(j), (k).)

**Effect of Amendments.** — Session Laws 1995, c. 509, s. 135.1(j) and (k), effective July 29, 1995, substituted "license under Article 13D of Chapter 90 of the General Statutes" for "certificate under G.S. 90-210.30 through 90-210.37" in subsection (a); and rewrote subsection (k).

# Chapter 66.

# Commerce and Business.

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## ARTICLE 1.

## *Regulation and Inspection.*

### § 66-4. Falsely acting as inspector.

If any person, who is not a legal or sworn inspector of lumber or other articles, presume to act as such, he shall forfeit and pay one hundred dollars ($100.00), and be guilty of a Class 1 misdemeanor. (1824, c. 1254, s. 3; R.C., c. 60, s. 69; Code, s. 3046; Rev., s. 3580; C.S., s. 5072; 1993, c. 539, s. 503; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 503, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 66-8: Repealed by Session Laws 1995, c. 379, s. 18.3, effective July 6, 1995.

**Editor's Note.** — Session Laws 1995, c. 379, which repealed this section, in s. 20 provides that that act does not affect pending litigation.

## § 66-10. Failure of dealers of scrap, salvage, or surplus to keep record of purchases of certain items misdemeanor.

(a) Every person, firm, or corporation buying rubber or leather, rubber belts, and belting, as scrap, salvage, or surplus shall keep a register containing a true and accurate record of each purchase, including the description of the article purchased, the name from whom purchased, the amount paid for the article purchased, the date of the purchase, and any and all marks or brands upon the rubber or leather, rubber belts, and belting. This register and the rubber, leather, rubber belts, and belting purchased shall be at all times open to the inspection of the public. A failure to comply with these requirements or the making of a false entry concerning the rubber or leather, rubber belts, or belting shall constitute a Class 1 misdemeanor.

(b) Every person, firm, or corporation engaged in the business of buying or dealing in scrap, salvage, or surplus, including glass, waste paper, burlap, cloth, cordage, rubber, leather, or belting of every kind, in addition to the above requirements under subsection (a) of this section, shall make and keep a record of the name and address of the person from whom this scrap, salvage, or surplus is purchased and the license number, if any, and if there is no license, a description of the vehicle in which this scrap, salvage, or surplus is delivered. Any person, firm, or corporation which fails to comply with the requirements of this subsection shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined not in excess of fifty dollars ($50.00) in the discretion of the court. (1917, c. 46; C.S., s. 5090; 1957, c. 791; 1993, c. 295, s. 1; 1993, c. 539, s. 504; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 504, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 295, s. 1, which amended this section, became effective December 1, 1993, and applied only to offenses committed on or after that date.

## § 66-11. Dealing in regulated metals property; violations of section Class 1 misdemeanor.

(a) Definitions. — As used in this section:

(1) "Law enforcement officer" means any duly constituted law enforcement officer of the State or of any municipality or county.

(2) "Regulated metals property" means all ferrous and nonferrous metals.

(3) "Secondary metals recycler" means any person, firm, or corporation in the State:

a. That, from a fixed location or otherwise, is predominately engaged in the business of gathering or obtaining ferrous or nonferrous metals that have served their original economic purpose or is in the business of performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value; or

b. That has facilities for performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value, by methods including, but not limited to, the processing, sorting, cutting, classifying, cleaning, baling, wrapping, shredding, shearing, or changing the physical form or chemical content of the metals, but not including the exclusive use of hand tools.

(4) "Fixed location" means any site occupied by a secondary metals recycler as the owner of the site or as a lessee of the site under a lease or other rental agreement providing for occupation of the site by the secondary metals recycler for a total duration of not less than 364 days.

(b) Records Required. —

(1) A secondary metals recycler shall maintain a record of all purchase transactions in which the secondary metals recycler purchases regulated metals property.

(2) The following information shall be maintained for transactions in which a secondary metals recycler purchases regulated metals property:

a. The name and address of the secondary metals recycler.

b. The name, initials, or other identification of the individual entering the information.

c. The date of the transaction.

d. The weight of the regulated metals property purchased.

e. The description made in accordance with the custom of the trade of the type of regulated metals property purchased.

f. The amount of consideration given for the regulated metals property.

g. The name and address of the vendor of the regulated metals property.

h. The drivers license number or identification card number issued by the Division of Motor Vehicles of the person delivering the regulated metals property to the secondary metals recycler, or, if the person delivering the regulated metals property does not have a drivers license or an identification card issued by the Division of Motor Vehicles, a signed written statement that the delivery person does not have a drivers license or an identification card issued by the Division of Motor Vehicles.

(3) A secondary metals recycler shall keep and maintain the information required under this subsection for not less than two years from the date of the purchase of the regulated metals property.

(c) Inspection of Regulated Metals Property and Records. — During the usual and customary business hours of a secondary metals recycler, a law enforcement officer shall have the right to inspect either of the following:

(1) Any and all purchased regulated metals property in the possession of the secondary metals recycler.

(2) Any and all records required to be maintained under subsection (b) of this section.

(d) Cash Transactions. — No secondary metals recycler shall purchase regulated metals property for cash consideration from other than a fixed location.

(e) Right to Restitution. — The court may order a defendant to make restitution to the secondary metals recycler for any damage or loss caused by the defendant arising out of an offense committed by the defendant.

(f) Violations. — Any person violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor.

(g) Exemptions. — This section shall not apply to purchases of regulated metals property from a manufacturing, industrial, or other commercial vendor that generates or sells regulated metals property in the ordinary course of its business.

(h) Preemption. — A county or municipality shall not enact any local law, ordinance, or regulation regulating secondary metals recyclers or regulated metals property that conflicts with this section, and this law preempts all existing laws, ordinances, or regulations. (1907, c. 464; 1909, c. 855, s. 1; C.S., s. 5091; 1967, c. 792; 1971, c. 1231, s. 1; 1975, c. 182, s. 2; 1993, c. 295, s. 2; c. 539, s. 505; 1994, Ex. Sess., c. 14, s. 40; c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 40(a), effective October 1, 1994, repealed Session Laws 1993, c. 539, s. 505, which would have amended this section as it read prior to amendment by Session Laws 1993, c. 295, s. 2, effective October 1, 1994, by substituting "Class 1 misdemeanor" for "misdemeanor."

Session Laws 1993, c. 295, s. 2, which amended this section, became effective December 1, 1993, and applied only to offenses committed on or after that date.

Session Laws 1994, Extra Session, c. 14, s. 40(b) and (c), which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

## § 66-11.1. Transportation of copper.

It shall be unlawful for any person to transport or have in his possession on highways of this State, in any vehicle other than a vehicle used in the ordinary course of business for the purpose of transporting such copper, an amount of such copper of an aggregate weight of more than 25 pounds, unless such person shall have in his possession

(1) A bill of sale pertaining to such copper signed by (i) a holder of a sales and use tax registration number from the North Carolina Department of Revenue; or (ii) an authorized wholesaler engaged in the sale of such copper; or (iii) a registered dealer in scrap metals; or (iv) a seller of antiques or objects of art; or

(2) In the event the person from whom such copper was purchased was other than one of the above enumerated persons or firms, a certificate of origin signed by the sheriff, or his designated representative, of the county in which the purchase was made.

Such bill of sale or certificate of origin shall clearly identify the material to which it applies and show thereon the name and address of the seller, license plate of the vehicle in which such material is delivered to the purchaser, identified by license number, year and state of issue, the name and address of the purchaser, the date of sale, and the type and amount of such copper purchased.

Any person violating the provisions of this section shall be deemed guilty of a Class 2 misdemeanor. (1975, c. 182, s. 1; 1993, c. 539, s. 506; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 506, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 2.

## *Manufacture and Sale of Matches.*

### § 66-16. Violation of Article a misdemeanor.

Any person, association, or corporation violating any of the provisions of this Article shall be guilty of a Class 3 misdemeanor and shall only be fined for the first offense not less than five dollars ($5.00) nor more than twenty-five dollars ($25.00), and for each subsequent violation not less than twenty-five dollars ($25.00). (1915, c. 109, s. 12, IV; C.S., s. 5117; 1993, c. 539, s. 507; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 3.

## *Candy and Similar Products.*

### § 66-22. Violations made misdemeanor.

Any person convicted for the violation of this Article shall be guilty of a Class 3 misdemeanor. (1939, c. 323, s. 6; 1993, c. 539, s. 508; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 508, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 4.

## *Electrical Materials, Devices, Appliances and Equipment.*

### § 66-27. Violation made misdemeanor.

Any person, firm or corporation who shall violate any of the provisions of this Article shall be guilty of a Class 2 misdemeanor. (1933, c. 555, s. 5; 1989, c. 681, s. 1; 1993, c. 539, s. 509; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 509, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 4A.

## *Safety Features of Hot Water Heaters.*

### § 66-27.3. Violation of Article made misdemeanor.

Violation of any provision of this Article is hereby made a Class 1 misdemeanor. (1965, c. 860, s. 3; 1993, c. 539, s. 510; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 510, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 4B.

## *Safety Features of Trailers.*

### § 66-27.5. House trailers to have two doors.

(a) In order to provide greater protection from the dangers of fire, every new house trailer having a body length exceeding 32 feet and manufactured or assembled after January 1, 1970, and sold in this State shall, if such house trailer is to be used as a residence or dwelling within this State, be equipped with at least two doors. These doors shall be located in the vicinity of the front and rear rooms of the house trailer. Provided, however, this section shall not apply: to any (i) travel trailer which is factory equipped for the road and designed to be used as a dwelling for travel, recreational or vacation use, if such travel trailer does not exceed 32 feet in length; (ii) to any house trailer of any length sold in North Carolina for use in a state other than North Carolina.

(b) It shall be unlawful for any dealer to sell in this State any house trailer manufactured or assembled after January 1, 1970, having a body length exceeding 32 feet which does not conform to the specifications set forth in subsection (a). Any dealer who violates this section shall be guilty of a Class 3 misdemeanor. (1969, c. 463; 1993, c. 539, s. 511; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 511, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 7.

## *Tagging Secondhand Watches.*

### §§ 66-30 through 66-34: Repealed by Session Laws 1995, c. 379, s. 18.4, effective July 6, 1995.

**Editor's Note.** — Session Laws 1995, c. 379, which repealed this article, in s. 20 provides that that act does not affect pending litigation.

## ARTICLE 11.

## *Government in Business.*

### § 66-58. Sale of merchandise by governmental units.

(a) Except as may be provided in this section, it shall be unlawful for any unit, department or agency of the State government, or any division or subdivision of any such unit, department or agency, or any individual employee or employees of any such unit, department or agency in his, or her, or their capacity as employee or employees thereof, to engage directly or indirectly in the sale of goods, wares or merchandise in competition with citizens of the State, or to engage in the operation of restaurants, cafeterias or other eating places in any building owned by or leased in the name of the State, or to maintain service establishments for the rendering of services to the public ordinarily and customarily rendered by private enterprises, or to contract with any person, firm or corporation for the operation or rendering of any such businesses or services on behalf of any such unit, department or agency, or to purchase for or sell to any person, firm or corporation any article of merchandise in competition with private enterprise. The leasing or subleasing of space in any building owned, leased or operated by any unit, department or agency or division or subdivision thereof of the State for the purpose of operating or rendering of any of the businesses or services herein referred to is hereby prohibited.

(b) The provisions of subsection (a) of this section shall not apply to:

(1) Counties and municipalities.
(2) The Department of Human Resources, the Department of Environment, Health, and Natural Resources, or the Department of Agriculture for the sale of serums, vaccines, and other like products.
(3) The Department of Administration, except that said agency shall not exceed the authority granted in the act creating the agency.
(4) The State hospitals for the insane.
(5) The Department of Human Resources.
(6) The North Carolina School for the Blind at Raleigh.
(7) The North Carolina Schools for the Deaf.
(8) The Greater University of North Carolina with regard to its utilities and other services now operated by it nor to the sale of articles produced incident to the operation of instructional departments, articles incident to educational research, articles of merchandise incident to classroom work, meals, books, or to articles of merchandise not exceeding twenty-five cents (25¢) in value when sold to members of the educational staff or staff auxiliary to education or to duly enrolled students or occasionally to immediate members of the families of members of the educational staff or of duly enrolled students nor to the sale of meals or merchandise to persons attending meetings or conventions as invited guests nor to the operation by the University of North Carolina of an inn or hotel and dining and other facilities usually connected with a hotel or inn, nor to the hospital and Medical School of the University of North Caroliña, nor to the Coliseum of North Carolina State College, and the other schools and colleges for higher education maintained or supported by the State, nor to the comprehensive student health services or the comprehensive student infirmaries maintained by the constituent institutions of the University of North Carolina.
(9) The Department of Environment, Health, and Natural Resources, except that said Department shall not construct, maintain, operate or lease a hotel or tourist inn in any park over which it has jurisdiction. The North Carolina Wildlife Resources Commission may sell wildlife memorabilia as a service to members of the public interested in wildlife conservation.
(10) Child-caring institutions or orphanages receiving State aid.
(11) Highlands School in Macon County.
(12) The North Carolina State Fair.
(13) Rural electric memberships corporations.
(13a) State Farm Operations Commission.
(13b) The Department of Agriculture with regard to its lessees at farmers' markets operated by the Department.
(13c) The Western North Carolina Agricultural Center.
(14) Nothing herein contained shall be construed to prohibit the engagement in any of the activities described in subsection (a) hereof by a firm, corporation or person who or which is a lessee of space only of the State of North

Carolina or any of its departments or agencies; provided such leases shall be awarded by the Department of Administration to the highest bidder, as provided by law in the case of State contracts and which lease shall be for a term of not less than one year and not more than five years.

(15) The State Department of Correction is authorized to purchase and install automobile license tag plant equipment for the purpose of manufacturing license tags for the State and local governments and for such other purposes as the Department may direct.

The Commissioner of Motor Vehicles, or such other authority as may exercise the authority to purchase automobile license tags is hereby directed to purchase from, and to contract with, the State Department of Correction for the State automobile license tag requirements from year to year.

The price to be paid to the State Department of Correction for such tags shall be fixed and agreed upon by the Governor, the State Department of Correction, and the Motor Vehicle Commissioner, or such authority as may be authorized to purchase such supplies.

(16) Laundry services performed by the Department of Correction may be provided only for agencies and instrumentalities of the State which are supported by State funds and for county or municipally controlled and supported hospitals presently being served by the Department of Correction, or for which services have been contracted or applied for in writing, as of May 22, 1973. In addition to the prior sentence, laundry services performed by the Department of Correction may be provided for the Governor Morehead School and the North Carolina School for the Deaf.

Such services shall be limited to wet-washing, drying and ironing of flatwear or flat goods such as towels, sheets and bedding, linens and those uniforms prescribed for wear by such institutions and further limited to only flat goods or apparel owned, distributed or controlled entirely by such institutions and shall not include processing by any dry-cleaning methods; provided, however, those garments and items presently being serviced by wet-washing, drying and ironing may in the future, at the election of the Department of Correction, be processed by a dry-cleaning method.

(17) The North Carolina Global TransPark Authority or a lessee of the Authority.

(18) The activities and products of private enterprise carried on or manufactured within a State prison facility pursuant to G.S. 148-70.

(c) The provisions of subsection (a) shall not prohibit:

(1) The sale of products of experiment stations or test farms.

(2) The sale of learned journals, works of art, books or publications of the Department of Cultural Resources or other agencies, or the Supreme Court Reports or Session Laws of the General Assembly.

(3) The business operation of endowment funds established for the purpose of producing income for educational purposes; for purposes of this section, the phrase "operation of endowment funds" shall include the operation by public

postsecondary educational institutions of campus stores, the profits from which are used exclusively for awarding scholarships to defray the expenses of students attending the institution; provided, that the operation of such stores must be approved by the board of trustees of the institution, and the merchandise sold shall be limited to educational materials and supplies, gift items and miscellaneous personal-use articles. Provided further that sales at campus stores are limited to employees of the institution and members of their immediate families, to duly enrolled students of the campus at which a campus store is located and their immediate families, to duly enrolled students of other campuses of the University of North Carolina other than the campus at which the campus store is located, to other campus stores and to other persons who are on campus other than for the purpose of purchasing merchandise from campus stores. It is the intent of this subdivision that campus stores be established and operated for the purpose of assuring the availability of merchandise described in this Article for sale to persons enumerated herein and not for the purpose of competing with stores operated in the communities surrounding the campuses of the University of North Carolina.

(4) The operation of lunch counters by the Department of Human Resources as blind enterprises of the type operated on January 1, 1951, in State buildings in the City of Raleigh.

(5) The operation of a snack bar and cafeteria in the State Legislative Building.

(6) The maintenance by the prison system authorities of eating and sleeping facilities at units of the State prison system for prisoners and for members of the prison staff while on duty, or the maintenance by the highway system authorities of eating and sleeping facilities for working crews on highway construction or maintenance when actually engaged in such work on parts of the highway system.

(7) The operation by penal, correctional or facilities operated by the Department of Human Resources or by the State Department of Agriculture, of dining rooms for the inmates or clients or members of the staff while on duty and for the accommodation of persons visiting such inmates or clients, and other bona fide visitors.

(8) The sale by the Department of Agriculture of livestock, poultry and publications in keeping with its present livestock and farm program.

(9) The operation by the public schools of school cafeterias.

(10) Sale by any State correctional or other institution of farm, dairy, livestock or poultry products raised or produced by it in its normal operations as authorized by the act creating it.

(11) The sale of textbooks, library books, forms, bulletins, and instructional supplies by the State Board of Education, State Department of Public Instruction, and local school authorities.

(12) The sale of North Carolina flags by or through the auspices of the Department of Administration, to the citizens of North Carolina.

(13) The operation by the Department of Correction of forestry management programs on State-owned lands, including the sale on the open market of timber cut as a part of such management program.

(14) The operation by the Department of Correction of facilities to manufacture and produce traffic and street name signs for use on the public streets and highways of the State.

(15) The operation by the Department of Correction of facilities to manufacture and produce paint for use on the public streets and highways of the State.

(16) The performance by the Department of Transportation of dredging services for a unit of local government.

(17) The sale by the State Board of Elections to political committees and candidate committees of computer software designed by or for the State Board of Elections to provide a uniform system of electronic filing of the campaign finance reports required by Article 22A of Chapter 163 of the General Statutes and to facilitate the State Board's monitoring of compliance with that Article. This computer software for electronic filing of campaign finance reports shall not exceed a cost of one hundred dollars ($100.00) to any political committee or candidate committee without the State Board of Elections first notifying in writing the Joint Legislative Commission on Governmental Operations.

(d) A department, agency or educational unit named in subsection (b) shall not perform any of the prohibited acts for or on behalf of any other department, agency or educational unit.

(e) Any person, whether employee of the State of North Carolina or not, who shall violate, or participate in the violation of this section, shall be guilty of a Class 1 misdemeanor.

(f) Notwithstanding the provisions of G.S. 66-58(a), the operation by the Department of Correction of facilities for the manufacture of any product or the providing of any service pursuant to G.S. 148-70 not regulated by the provisions of subsection (c) hereof, shall be subject to the prior approval of the Governor, with biennial review by the General Assembly, at the beginning of each fiscal year commencing after October 1, 1975. The Department of Correction shall file with the Director of the Budget quarterly reports detailing prison enterprise operations in such a format as shall be required by the Director of the Budget.

(g) The North Carolina School of Science and Mathematics may engage in any of the activities permitted by G.S. 66-58(b)(8) and (c)(3). (1929, c. 221, s. 1; 1933, c. 172, s. 18; 1939, c. 122; 1941, c. 36; 1951, c. 1090, s. 1; 1957, c. 349, ss. 6, 10; 1967, c. 996, s. 13; 1973, c. 476, ss. 48, 128, 143; c. 671, s. 1; c. 965; c. 1262, s. 86; c. 1294; c. 1457, s. 7; 1975, c. 730, ss. 2-5; c. 840; c. 879, s. 46; 1977, cc. 355, 715; c. 771, s. 4; 1979, c. 830, s. 4; 1981, c. 635, s. 3; 1983, c. 8; c. 476; c. 717, s. 13; c. 761, s. 168; 1985, c. 589, s. 28; c. 757, s. 206(d); 1989, c. 727, s. 218(9); 1989 (Reg. Sess., 1990), c. 1004, s. 1; 1991, c. 749, s. 7; 1991 (Reg. Sess., 1992), c. 902, s. 3; 1993, c. 539, s. 513; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 769, s. 17.15; c. 777, s. 4(e); 1995, c. 247, s. 2; c. 507, s. 13.1(a).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 513, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra

Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 13.1(b), provides: "The funds appropriated in this act to the State Board of Elections for the purchase of developing computer software to provide a uniform system of electronic filing of campaign finance reports shall be expended for development of software for use by the State Board of Elections and political committees or candidate committees."

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 fiscal biennium."

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

**Effect of Amendments.** — Session Laws 1995, c. 247, s. 2, effective July 1, 1995, added subdivision (c)(16).

Session Laws 1995, c. 507, s. 13.1(a), effective July 1, 1995, added subdivision (c)(17).

## ARTICLE 12.

## *Coupons for Products of Photography.*

### §§ 66-59 through 66-64: Repealed by Session Laws 1995, c. 379, s. 18.5, effective July 6, 1995.

**Editor's Note.** — Session Laws 1995, c. 379, which repealed this article, in s. 20 provides that that act does not affect pending litigation.

## ARTICLE 13.

## *Miscellaneous Provisions.*

### § 66-66. Manufacture or sale of antifreeze solutions compounded with inorganic salts or petroleum distillates prohibited.

The manufacture or sale of antifreeze solutions which are designated, intended, advertised, or recommended by the manufacturer or seller for use in the cooling systems of motor vehicles or gasoline combustion engines, and which are compounded with calcium chloride, magnesium chloride, sodium chloride, or other inorganic salts or with petroleum distillates is hereby prohibited.

Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1943, c. 625, ss. 1, 2; 1993, c. 539, s. 515; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 515, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-67.2. Persons who sell used goods on consignment must keep certain records.

(a) A person who is engaged in the business of selling used tangible personal property on consignment must keep a record of each piece of property consigned to that person for sale. The record must contain all of the following information:
(1) A description of the property, including any model or serial number of the property.
(2) The name, residence address, telephone number, and drivers license number or other identifying number of the owner of the property.
(3) The date the property was consigned.
(4) The owner's stated value of the property.

(b) The consignee shall provide the owner with a copy of the record required by subsection (a) of this section.

(c) A person who fails to keep the records required by this section is guilty of a Class 2 misdemeanor. A law enforcement agency may examine the records required to be kept under this section during business hours.

(d) This section does not apply to a motor vehicle.

(e) This section does not apply to any nonprofit organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)). (1991, c. 536, s. 1; 1993, c. 539, s. 516; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note. —** Session Laws 1993, c. 539, s. 516, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-67.3. Disposal of dies, molds, forms, and patterns.

(a) Definitions. — The following definitions apply in this section:
(1) Customer. — Either of the following:
a. A person who causes or caused a molder to fabricate, cast, or otherwise make a die, mold, form, or pattern.
b. A person who causes or caused a molder to use a die, mold, form, or pattern to manufacture, assemble, or otherwise make a product.
(2) Molder. — A tool or die maker or any other person who does either of the following:
a. Fabricates, casts, or otherwise makes a die, mold, form, or pattern.
b. Uses a die, mold, form, or pattern to manufacture, assemble, or otherwise make a product.

(b) Ownership and Transfer. — A customer has all rights, title, and interest to a die, mold, form, or pattern made or used by a molder on behalf of the customer unless an agreement provides otherwise. If the customer does not claim possession of the die, mold, form, or pattern from the molder within three years after the last time it is used, the molder may choose to obtain all rights, title, and interest to the die, mold, form, or pattern by operation of law unless a written agreement provides otherwise.

(c) Procedure. — If a molder chooses to have all rights, title, and interest to a die, mold, form, or pattern transferred to the molder by operation of law, the molder must send a written notice, by registered mail, return receipt requested, to the customer and to any known secured creditor. The notice must state that the molder intends to terminate the customer's rights, title, and interest in a mold, die, form, or pattern by having those rights, title, and interest transferred to the molder by operation of law pursuant to this section. The notice to the customer must be sent to the customer's last known address or, if the customer has designated in writing a different address for receipt of the notice, to the designated address. If a return receipt cannot be obtained for a notice that is mailed, the molder may give notice by publication in accordance with G.S. 1A- 1, Rule 4(j1). The rights, title, and interest in a die, mold, form, or pattern are transferred by operation of law to a molder who gives notice as required by this section unless, within 30 days after the date the molder receives acknowledgement of the return receipt of a notice that is mailed or 45 days after the date of first publication of a notice made by publication, the customer takes possession of the die, mold, form, or pattern, or makes other contractual arrangements with the molder for taking possession of or for storing the die, mold, form, or pattern.

(d) Use Upon Transfer. — A molder to whom the rights, title, and interest in a die, mold, form, or pattern is transferred by operation of law under this section may destroy or otherwise dispose of the die, mold, form, or pattern as the molder's own property without any risk of liability to the customer. The molder may not use the die, mold, form, or pattern for any other purpose.

(e) Scope. — This section does not affect a right of a customer under federal patent or copyright law or any state or federal law pertaining to unfair competition. (1993, c. 541, s. 9.)

**Editor's Note.** — Session Laws 1993, c. 541, s. 10 made this section effective upon ratification. The act was ratified July 24, 1993.

Session Laws 1993, c. 541, s. 10 provides that s. 9, which added this section, applies to dies, molds, forms, or patterns made or used before, on, or after the effective date of the act (July 24, 1993).

## ARTICLE 14.

## *Business under Assumed Name Regulated.*

### § 66-71. Violation of Article a misdemeanor; civil penalty.

(a) Any person, partner or corporation failing to file the certificate as required by G.S. 66-68(a) or G.S. 66-68(c) —

(1) Shall be guilty of a Class 3 misdemeanor, and

(2) Shall be liable in the amount of fifty dollars ($50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

(b) The failure of any person to comply with the provisions of this Article does not prevent a recovery by such person in any civil action brought in any of the courts of this State. (1913, c. 77, s. 4; 1919, c. 2; C.S., s. 3291; 1951, c. 381, ss. 6, 7; 1987, c. 723, s. 4; 1993, c. 539, s. 517; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 517, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 16.

## *Unfair Trade Practices in Diamond Industry.*

### § 66-75. Penalty for violation; each practice a separate offense.

Any person, firm, corporation or organization engaging in any unfair trade practice, as defined in this Article, shall be guilty of a Class 1 misdemeanor; and each and every unfair trade practice engaged in shall be deemed a separate offense. (1957, c. 585, s. 3; 1993, c. 539, s. 518; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 518, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 17.

## *Closing-Out Sales.*

### § 66-81. Advertising or conducting sale contrary to Article; penalty.

Any person who shall advertise, hold, conduct or carry on any sale of goods, wares or merchandise under the description of closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale, contrary to the provisions of this Article, or who shall violate any of the provisions of this Article shall be deemed guilty of a Class 1 misdemeanor. (1957, c. 1058, s. 6; 1981, c. 633, s. 7; 1993, c. 539, s. 519; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 519, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 18.

## *Labeling of Household Cleaners.*

### § 66-86. Penalty for selling product in violation of Article.

Any person, firm or corporation selling or offering to sell any product in violation of the terms of this Article shall be guilty of a Class 1 misdemeanor. (1957, c. 1241, s. 2; 1993, c. 539, s. 520; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 520, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 19.

## *Business Opportunity Sales.*

### § 66-95. Required disclosure statement.

CASE NOTES

**Cited** in Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994).

### § 66-97. Filing with Secretary of State.

(a) The seller of every business opportunity shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-95, accompanied by a fee in the amount of ten dollars ($10.00) made payable to the Secretary of State, prior to placing any advertisement or making any other representations to prospective purchasers in this State. The seller shall update this filing as any material change in the required information occurs, but no less than annually.

(b) Every seller shall file, in such form as the Secretary of State may prescribe, an irrevocable consent appointing the Secretary of State or his successors in office to be his attorney to receive service of any lawful process in any noncriminal suit, action or proceeding against the seller or his successor, executor or administrator which arises under this Article after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. Service may be made by leaving a copy of the process in the office of the Secretary of State, but is not effective unless (i) the plaintiff, who may be the Attorney General in a suit, action or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his address on file with the Secretary of State, and (ii) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return date of the process, if any, or within such further time as the court allows.

(c) If the seller of a business opportunity is required by G.S. 66-96 to provide a bond or establish a trust account, he shall file with the Secretary of State two copies of the bond or two copies of the formal notification by the depository that the trust account is established contemporaneously with compliance with subsections (a) or (d).

(d) The Secretary of State may accept the Uniform Franchise Offering Circular (UFOC) or the Federal Trade Commission Basic Disclosure Document, provided, that the alternative disclosure document shall be accompanied by a separate sheet setting forth the caption and statement and any other information required by G.S. 66-95.

(e) Failure to so file shall be a Class 1 misdemeanor. (1977, c. 884, s. 1; 1981, c. 817, s. 3; 1993, c. 539, s. 521; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 521, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-98. Prohibited acts.

### CASE NOTES

**Evidence Required.** — Trial court erred by failing to make findings of fact as to whether defendant made representations of income or earning potential and whether it further failed to disclose information substantiating those representations. Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994).

## § 66-100. Remedies.

### CASE NOTES

**Cited** in Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994).

## ARTICLE 20.

## *Loan Brokers.*

## § 66-106. Definitions.

For purposes of this Article the following definitions apply:

(1) A "loan broker" is any person, firm, or corporation who, in return for any consideration from any person, promises to (i) procure for such person, or assist such person in procuring, a loan from any third party; or (ii) consider whether or not it will make a loan to such person.

(2) A "loan" is an agreement to advance money or property in return for the promise to make payments therefor, whether such agreement is styled as a loan, credit card, line of credit, a lease or otherwise.

Provided, that this Article shall not apply to any party approved as a mortgagee by the Secretary of Housing and Urban Development, the Federal Housing Administration, the Veterans Administration, a National Mortgage Association or any federal agency; nor to any party currently designated and compensated by a North Carolina licensed insurance company as its agent to service loans it makes in this State; nor to any insurance company registered with and licensed by the North Carolina Insurance Commissioner; nor, with respect to residential mortgage loans, to any residential mortgage banker or mortgage broker registered with the Commissioner of Banks pursuant to Article 19 of Chapter 53 or exempt from such registration pursuant to G.S. 53-234(6); nor to any attorney-at-law, public accountant, or dealer registered under the North Carolina Securities Act, acting in the professional capacity for which such attorney-at-law, public accountant, or dealer is registered or licensed under the laws of the State of North Carolina. Provided further that subdivision (1)(ii) above shall not apply to any lender whose loans or advances to any person, firm or corporation in North Carolina aggregate more than one million dollars ($1,000,000) in the preceding calendar year. (1979, c. 705, s. 1; 1981, c. 785, s. 1; 1993, c. 339, s. 2.)

## § 66-108. Bond or trust account required.

(a) Every loan broker must obtain a surety bond issued by a surety company authorized to do business in this State, or establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. The amount of the bond or trust account shall be ten thousand dollars ($10,000). The bond or trust account shall be in favor of the State of North Carolina. Any person damaged by the loan broker's breach of contract or of any obligation arising therefrom, or by any violation of this Article, may bring an action against the bond or trust account to recover damages suffered. The aggregate liability of the surety or trustee shall be only for actual damages and in no event shall exceed the amount of the bond or trust account.

(b) Failure to comply with subsection (a) shall be a Class 1 misdemeanor.

(c) No loan broker shall collect any advance fee or other valuable consideration from a borrower prior to the closing of the loan. This prohibition shall not preclude the loan broker from collecting reasonable and necessary fees payable to third parties for appraisal, property survey, title examination, and credit reports. (1979, c. 705, s. 1; 1993, c. 339, s. 3; c. 539, s. 522; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 522, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-109. Filing with Secretary of State.

(a) Prior to placing any advertisement or making any other representations to prospective borrowers in this State, every loan broker shall file with the Secretary of State two copies of the disclosure statement required by G.S. 66-107, and either a copy of the bond required by G.S. 66-108, or a copy of the formal notification by the depository that the trust account required by G.S. 66-108 is established. These filings shall be updated as any material changes in the required information or the status of the bond or trust account occur, but no less than annually.

(b) Failure to comply with subsection (a) shall be a Class 1 misdemeanor. (1979, c. 705, s. 1; 1981, c. 785, s. 2; 1993, c. 539, s. 523; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 523, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 22.

## *Discount Buying Clubs.*

## § 66-135. Bond and trust account required.

(a) Every discount buying club shall obtain and maintain a bond from a surety company licensed to do business in North Carolina. Such bond shall be in an amount not less than one hundred times the one-time or annual membership fee, or fifty thousand dollars ($50,000), whichever is greater.

(b) Every discount buying club shall hold advance payments for goods and services in trust in a separate account used solely for that purpose. The funds in such account shall be held free from all liens. Records of such account shall be kept by the buying club in the regular course of its business sufficient to identify the amount held for each customer, the dates of the receipt and withdrawal of funds, and the purpose of withdrawal. Such records must be retained for a period not less than four years following withdrawal. Funds may not be withdrawn from the trust account unless and until (i) the ordered goods have been actually delivered to the customer or consigned to a certified public carrier, or (ii) ordered services have been provided in full, or (iii) the buying club has refunded the customer's payment. Provided, the discount buying club shall not be required to comply with the foregoing trust account requirements if the discount buying club meets the requirements of G.S. 66-132(b), bills its customers through a credit card account and obtains and maintains an additional bond in the amount of fifty thousand dollars ($50,000) from a surety company licensed to do business in North Carolina.

(c) Any person who is damaged by any violation of this Article, or by any breach by the discount buying club of its contract, may bring an action against the bond, provided that the aggregate liability of the surety shall not exceed the amount of the bond.

(d) Violations of subsections (a) or (b) of this section shall constitute a Class I felony. (1981, c. 594, s. 1; 1989, c. 495, ss. 2, 3; 1993, c. 539, s. 1282; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 1282, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 23.

## *Rental Referral Agencies.*

### § 66-145. Bond or trust account required.

(a) Every rental referral agency before beginning business shall establish a trust account with a licensed and insured bank or savings institution located in the State of North Carolina. Each deposit to be applied towards a fee collected under G.S. 66-143(b) shall be placed in the trust account and shall be withdrawn only to refund the deposit to the applicant pursuant to G.S. 66-143(b)(2) or when a fee is earned by the agency as provided in G.S. 66-143(a).

(b) A rental referral agency may elect to post a bond in lieu of the trust account required by this section. The amount of the bond shall at no time be less than the amount that would be required by this section to be held in trust. In no event, however, shall the bond be less than five thousand dollars ($5,000). The rental referral agency shall file the bond with the clerk of the superior court of the county in which its principal place of business is located.

(c) Any person who is damaged by any violation of this Article, or by any breach by the rental referral agency of its contract, may bring an action for the remedies referred to and provided in G.S. 66-146 against the bond or trust account; provided that the aggregate liability of the surety or trustee shall not exceed the amount of the bond or trust account.

(d) Violation of subsections (a) or (b) of this section shall constitute a Class 1 misdemeanor. (1981, c. 610, s. 1; 1993, c. 539, s. 524; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 524, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 24.

## *Trade Secrets Protection Act.*

### § 66-152. Definitions.

CASE NOTES

**Section 75-1.1 Applicable to Violations of This Act.** — Section 75-1.1 is applicable to violations of the Trade Secrets Protection Act. Drouillard v. Keister Williams Newspaper Servs., Inc., 108 N.C. App. 169, 423 S.E.2d 324 (1992), cert. denied, 333 N.C. 344, 427 S.E.2d 617 (1993).

**Establishing a Trade Secret.** — Subdivision (3) of this section, defines a trade secret as valuable business or technical information that a) is neither "generally known nor readily ascertainable through independent development or reverse engineering," and b) has been subject to "efforts that are reasonable under the circumstances to maintain its secrecy." In order to resist a motion for summary judgment, plaintiff must allege facts sufficient to allow a reasonable finder of fact to conclude that his concept satisfies these two requirements. Bank Travel Bank v. McCoy, 802 F. Supp. 1358 (E.D.N.C. 1992), aff'd sub nom., Amariglio-Dunn v. McCoy, 4 F.3d 984 (4th Cir. 1993).

**Trade Secrets Not Shown.** — Plaintiff did not present sufficient evidence that its processes were trade secrets where defendant came forward with evidence that it could purchase the same technology on the market from three or four other vendors. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

**A prima facie case of misappropriation existed** so as to support a preliminary injunction where defendant helped to develop software during his employ with plaintiff, had access to copies of the software source code prior to his resignation, and where it was practically impossible to make any substantial modification to the software without access to the source code. Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

**An employee will not be enjoined from working for its former employer's competitor** under the doctrine of "inevitable discovery" absent some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

**Quoted** in North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

### § 66-154. Remedies.

CASE NOTES

**Failure to Provide Evidence of Misappropriation.** — Where appellant presented sufficient evidence that it was likely to succeed in showing that certain documents sought by an adverse party in an arbitration proceeding contained trade secrets, but it offered no evidence of misappropriation, it failed to show a likelihood of success on the merits with respect to any claim brought pursuant to the Trade Secret Protection Act to enjoin disclosure of the documents. North Carolina Elec. Membership Corp. v. North Carolina Dep't of Economic & Community Dev., 108 N.C. App. 711, 425 S.E.2d 440 (1993).

**Trade Secrets Not Shown.** — Plaintiff did not present sufficient evidence that its processes were trade secrets where defendant came forward with evidence that it could purchase the same technology on the market from three or four other vendors. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

**An employee will not be enjoined from working for its former employer's competitor** under the doctrine of "inevitable discovery" absent some showing of bad faith, underhanded dealing, or employment by an entity so plainly lacking comparable technology that misappropriation can be inferred. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

**Injunctive Relief Not Required.** — Plaintiff failed to show a likelihood of irreparable harm to justify injunctive relief, because the Trade Secrets Protection Act provides a wide range of relief to which plaintiff would be entitled including royalties, actual and punitive damages, and attorney's fees for violation. FMC Corp. v. Cyprus Foote Mineral Co., 899 F. Supp. 1477 (W.D.N.C. 1995).

**Quoted** in Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

## § 66-155. Burden of proof.

### CASE NOTES

**A prima facie case of misappropriation existed** so as to support a preliminary injunction where defendant helped to develop software during his employ with plaintiff, had access to copies of the software source code prior to his resignation, and where it was practically impossible to make any substantial modification to the software without access to the source code. Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993).

**Burden of Proof** — Where plaintiff assigned as error the jury instruction that it was required to prove a violation of the trade secrets act by a preponderance of the evidence, rather than by "substantial evidence,", and where plaintiff failed to object to this instruction, and where it invited error when it proposed the preponderance-of-the-evidence instruction, the error was harmless. AG Sys. v. United Decorative Plastics Corp., 55 F.3d 970 (4th Cir. 1995).

## ARTICLE 25.

## *Regulation of Precious Metal Businesses.*

## § 66-167. Perjury; punishment.

Any person who shall willfully commit perjury in any application for a permit or exemption filed pursuant to this Article shall be guilty of a Class 2 misdemeanor. (1981, c. 956, s. 1; 1993, c. 539, s. 525; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 525, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-169. Records to be kept.

Every dealer to whom a permit has been issued pursuant to G.S. 66-165 shall maintain a tightly bound book or books (not loose- leaf), with pages numbered in sequence, in which shall be recorded, at the time of any purchase of precious metal, a serially numbered account and description of the specific items purchased, including, if applicable, the manufacturer's name, the model, the model number, the serial number, and any engraved numbers or initials found on the items, the date of the transaction, and the name, sex, race, residence, telephone number and driver's license number, if any, of the person selling the items purchased. Both the dealer and the seller shall sign the record entry. In the event the seller cannot furnish his driver's license, passport, or military identification card bearing his photograph, the dealer shall require two forms of positive identification.

The record book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. A copy of each record book entry shall be filed within 48 hours of the transaction in the office of the local law-enforcement agency. Mailing the required copy to the local law-enforcement agency within 48 hours shall constitute compliance with this section.

The files of local law-enforcement agencies which contain such copies of record book entries shall not be subject to inspection and examination as authorized by G.S. 132-6. Any public official or employee who shall knowingly and willfully permit any person to have access to or custody or possession of any portion of such files, unless the person is one specifically authorized by the local law-enforcement agency to have access thereto for purposes of law-enforcement investigation or civil or criminal proceedings, shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars ($500.00).

Every merchant to whom an exemption has been issued pursuant to G.S. 66-166 shall maintain a book in which shall be recorded, at the time of any purchase of precious metal, a description of the specific items purchased and the date of the transaction. This book shall be open at all reasonable times to inspection on the premises by law-enforcement agencies and shall not be destroyed until two years following the last transaction which the record book reflects. (1981, c. 956, s. 1; 1993, c. 539, s. 526; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 526, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-172. Penalties.

Any dealer who violates the provisions of this Article shall be deemed guilty of a Class 2 misdemeanor. In addition any dealer so convicted shall be ineligible for a dealer's permit for a period of three years from the date of conviction. Each and every violation shall constitute a separate and distinct offense. (1981, c. 956, s. 1; 1993, c. 539, s. 527; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 527, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-173. Portable smelters prohibited.

It shall be unlawful for any person to possess or operate a smelter in any mobile home, trailer, camper, or other vehicle or structure not permanently affixed to the ground, for the purpose of refining precious metals. Violation of the provisions of this section shall constitute a Class 2 misdemeanor. (1981, c. 956, s. 1; 1993, c. 539, s. 528; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 528, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 27.

## *Sales Representative Commissions.*

## § 66-190. Definitions.

### CASE NOTES

**Quoted** in D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

## § 66-192. Civil liability.

### CASE NOTES

**Subsection (c) of this section is a "Special Jurisdictional Statute"** as that term is used in § 1-75.4. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

Where plaintiff and defendants entered into a sales representation agreement whereby plaintiff agreed to act as a sales representative for defendants in this and other states and in return, defendants agreed to pay commissions to plaintiff, defendants were within the provisions of § 1-75.4(5)(a) and (b), a statute that is to be liberally construed. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

## ARTICLE 30.

## *Credit Repair Services Act.*

## § 66-225. Violations.

(a) If a credit repair business uses any untrue or misleading statements in connection with a credit repair contract, fails to fully comply with the requirements of this Article, or fails to comply with the terms of the contract or any obligation arising therefrom, then, upon written notice to the credit repair business, the consumer may void the contract, and shall be entitled to receive from the credit repair business all sums paid to the credit repair business, and recover any additional damages including reasonable attorneys' fees.

(b) Any waiver by a consumer of any of the provisions of this Article shall be deemed void and unenforceable by a credit repair business.

(c) Upon complaint of any person that a credit repair business has violated the provisions of this Article, the superior court shall have jurisdiction to enjoin that defendant from further such violations.

(d) In a proceeding involving this Article, the burden of proving an exemption or an exception from the definition of a credit repair business shall be borne by the person claiming the exemption or exception.

(e) The remedies provided herein shall be in addition to any other remedies provided for by law or in equity.

(f) The violation of any provision of this Article shall constitute an unfair trade practice under G.S. 75-1.1 and the violation of any provision of this Article shall constitute a Class I felony. (1991, c. 327, s. 1; 1993, c. 539, s. 1283; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 1283, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 31.

## *Membership Camping Act.*

### § 66-234. Registration of membership camping operator.

(a) The application for registration shall be on a form prescribed by the Secretary of State and shall include the following:

(1) The applicant's name, address, and the organizational form of the business, including the date, and jurisdiction under which the business was organized; the address of each of its offices in this State; and the name and address of each campground located in this State, which is owned or operated, in whole or in part, by the applicant;

(2) The name, address, and principal occupation for the past five years of every officer of the applicant, including its principal managers, and the extent and nature of the interest of each person at the time the application is filed;

(3) A list of all owners of ten percent (10%) or more of the capital stock of the applicant, except that this list is not required if the applicant is a company required to report under the Securities and Exchange Act of 1934;

(4) A brief description of and a certified copy of the instrument which creates the applicant's ownership of, or other right to use the campground and the facilities at the campground which are to be available for use by purchasers, and a brief description of any material encumbrance, together with a copy of any lease, license, franchise, reciprocal agreement or other agreement entitling the applicant to use such campground and facilities, and any material provision of the agreement which restricts a purchaser's use of such campground or facilities;

(5) A sample copy of each instrument which will be delivered to a purchaser to evidence his membership in the campground and a sample copy of each agreement which a purchaser will be required to execute;

(6) A list of special taxes or assessments, whether current or proposed, which affect the campground;

(7) A copy of the disclosure statement required by this Article;

(8) A narrative description of the promotional plan for the sale of the membership camping contracts;

(9) A statement of the relationship, if any, between the applicant and other parties owning, controlling or managing the campground and the expected duration of that relationship. If the relationship is a contractual one, a statement of the methods and conditions under which the relationship can be terminated prior to the expected termination of the relationship;

(10) A complete list of locations and addresses of any and all sales offices located within the State;

(11) The names of any other states or foreign countries in which an application for registration of the membership camping operator or the membership camping contract or any similar document has been filed; and

(12) A brief description of the membership camping operator's experience in the membership camping business, including the length of time such operator has been in the membership camping business; and a statement detailing whether the applicant within the past five years has been convicted of any misdemeanor or felony involving theft, fraud, dishonesty, or moral turpitude, or whether the applicant has been enjoined from, had any civil penalty assessed for, or been found to have engaged in any violation of any law designed to protect consumers. If the applicant is a corporation, this statement shall be provided for each officer of the corporation.

(b) The application shall be signed by the membership camping operator, an officer or general partner thereof or by another person holding a power of attorney for this purpose from the membership camping operator. If the application is signed pursuant to a power of attorney, a copy of the power of attorney shall be included with the application.

(c) The application shall be submitted along with the appropriate application fee.

(d) The registration of the membership camping operator shall be renewed annually with the fee required in G.S. 66-236 not later than 30 days prior to the anniversary of the current registration. The application shall include all changes which have occurred in the information included in the application previously filed.

(e) Registration with the Secretary of State shall not be deemed to be an approval or endorsement by the Secretary of State of the membership camping operator, his membership camping contract, or his campground, and any attempt by the membership camping operator to indicate that registration constitutes such approval or endorsement shall be unlawful. (1991 (Reg. Sess., 1992), c. 1009, s. 4; 1995 (Reg. Sess., 1996), c. 742, s. 34.)

**Effect of Amendments.** — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "66-236" for "66-226" in the first sentence of subsection (d).

## §§ 66-248, 66-249: Reserved for future codification purposes.

## ARTICLE 32.

## *Peddlers, Itinerant Merchants, and Specialty Markets.*

**[Effective July 1, 1997]**

### § 66-250. (Effective July 1, 1997) Definitions.

The following definitions apply in this Article:

(1) Itinerant merchant. — A person, other than a merchant with an established retail store in the county, who transports an inventory of goods to a building, vacant lot, or other location in a county and who, at that location, displays the goods for sale and sells the goods at retail or offers the goods for sale at retail.

(2) Peddler. — A person who travels from place to place with an inventory of goods, who sells the goods at retail or offers the goods for sale at retail, and who delivers the identical goods.

(3) Person. — An individual, a firm, an association, a partnership, a limited liability company, a corporation, a unit of government, or another group acting as a unit.

(4) Specialty market. — A location, other than a permanent retail store, where space is rented to others for the purpose of selling goods at retail or offering goods for sale at retail.

(5) Specialty market operator. — A person, other than the State or a unit of local government, who rents space, at a location other than a permanent retail store, to others for the purpose of selling goods at retail or offering goods for sale at retail.

(6) Specialty market vendor. — A person, other than a merchant with an established retail store in the county, who transports an inventory of goods to a specialty market and, at that location, displays the goods for sale and sells the goods at retail or offers the goods for sale at retail. (1996, 2nd Ex. Sess., c. 14, s. 24.)

**Editor's Note.** — Session Laws 1996, Second Extra Session, c. 14, s. 27(5), made this article effective July 1, 1997.

Session Laws 1996, Second Extra Session, c. 14, s. 26, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

"Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## § 66-251. (Effective July 1, 1997) Itinerant merchant and peddler must have permission of property owner.

An itinerant merchant or a peddler who travels from place to place by vehicle must obtain a written statement signed by the owner or lessee of any property upon which the itinerant merchant or peddler offers goods for sale giving the owner's or lessee's permission to offer goods for sale upon the property of the owner or lessee. This statement must clearly state the name of the owner or lessee, the location of the premises for which the permission is granted, and the dates during which the permission is valid. The statement must be conspicuously and prominently displayed, so as to be visible for inspection by patrons of the itinerant merchant or peddler, at the places or locations at which the goods are to be sold or offered for sale. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-252. (Effective July 1, 1997) Display and possession of retail sales tax license.

(a) When Required. — An itinerant merchant must keep the merchant's retail sales tax license conspicuously and prominently displayed, so as to be visible for inspection by patrons of the itinerant merchant at the places or locations at which the goods are to be sold or offered for sale. A peddler must carry the peddler's retail sales tax license when the peddler offers goods for sale and must produce the license upon the request of any customer, State or local revenue agent, or law enforcement agent. A specialty market vendor must keep the retail sales tax license conspicuously and prominently displayed, so as to be visible for inspection by patrons of the specialty market vendor at the places or locations at which the goods are to be sold or offered for sale. A specialty market operator must have its retail sales tax license, if any, available for inspection during all times that the specialty market is open and must produce it upon the request of any customer, State or local revenue agent, or law enforcement agent.

(b) Compliance. — The requirement that a retail sales tax license be displayed is satisfied if the vendor displays either of the following:

(1) A copy of the license.
(2) Evidence that the license has been applied for and the applicable license fee has been paid within 30 days before the date the license was required to be displayed. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-253. (Effective July 1, 1997) Display of identification upon request.

Upon the request of any customer, State or local revenue agent, or law enforcement agent, a peddler, an itinerant merchant, a specialty market operator, or a specialty market vendor must provide its name and permanent address. A peddler, itinerant merchant, specialty market operator, or specialty market vendor who is an individual must, upon the request of any customer, State or local revenue agent, or law enforcement agent, provide a valid drivers license, a special identification card issued under G.S. 20-37.7, a military identification, or a passport bearing a physical description of the person named reasonably describing the peddler, itinerant merchant, specialty market operator, or specialty market vendor. A peddler, itinerant merchant, specialty market operator, or specialty market vendor that is a corporation must, upon the request of any customer, State or local revenue agent, or law enforcement agent, give the name and registered agent of the corporation and the address of the registered office of the corporation, as filed with the Secretary of State. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-254. (Effective July 1, 1997) Records of source of new merchandise.

(a) Record Required. — Each peddler, itinerant merchant, and specialty market vendor must keep a written record of the source of new merchandise the merchant offers for sale. The record must be a receipt or an invoice from the person who sold the merchandise to the merchant. The receipt or invoice must specifically identify the product being sold by product name and quantity purchased and must contain the complete business name of the seller and a description of the type of business. If the seller was an individual, the receipt or invoice must contain the seller's drivers license number, its state of issuance and expiration date, and the seller's date of birth. The merchant must verify this information by comparing the seller's drivers license to the receipt or invoice and signing the receipt or invoice. A special identification card issued by the Division of Motor Vehicles may be used in place of the seller's drivers license for the purposes of providing and verifying information required under this section. If the seller was a corporation, the receipt or invoice must contain the corporation's federal tax identification number, the state of incorporation, the name and address of the corporation's registered agent in this State, if any, and the corporation's principal office address.

(b) Keeping the Record. — Each peddler, itinerant merchant, and specialty market vendor must keep the record required by subsection (a) of this section with the new merchandise being offered for sale. Once the new merchandise is sold, the merchant must keep the record for a period of three years after the date of the sale.

(c) Displaying Record or Affidavit. — A peddler, an itinerant merchant, or a specialty market vendor must produce either of the following upon the request of a law enforcement agent:

(1) The record required by subsection (a) of this section of the source of new merchandise the merchant offers for sale.

(2) An affidavit under oath or affirmation identifying the source of new merchandise the merchant offers for sale, including the name and address of the seller, the license number of any auctioneer seller, and the date and place of purchase of the merchandise.

A merchant's failure to produce the requested record or an affidavit within a reasonable time of request by a law enforcement agent is prima facie evidence of possession of stolen property. Pending the production of the requested record or affidavit, the agent may take the merchandise into custody as evidence at the time the request is made. Merchandise impounded under this subsection must be disposed of in accordance with G.S. 15-11.1.

(d) Posted Notice. — A specialty market operator must conspicuously post in plain view of all specialty market vendors a sign informing all vendors that failure to produce, upon the request of a law enforcement agent, either the records or affidavit required under this section is prima facie evidence of possession of stolen property. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-255. (Effective July 1, 1997) Specialty market registration list.

A specialty market operator must maintain a daily registration list of all specialty market vendors selling or offering goods for sale at the specialty market. The registration list must clearly and legibly show each specialty market vendor's name, permanent address, and retail sales and use tax registration number. The specialty market operator must require each specialty market vendor to exhibit a valid retail sales tax license for visual inspection by the specialty market operator at the time of registration, and must require each specialty market vendor to keep the retail sales tax license conspicuously and prominently displayed, so as to be visible for inspection by patrons of the specialty market vendor at the places or locations at which the goods are offered for sale. Each daily registration list maintained pursuant to this section must be retained by the specialty market operator for no less than two years and must at any time be made available upon request to any law enforcement officer. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-256. (Effective July 1, 1997) Exemptions from Article.

This Article does not apply to the following:

(1) A peddler or an itinerant merchant who sells only one or more of the following types of merchandise:
  a. Farm or nursery products produced by the merchant.
  b. Crafts or goods made by the merchant.
  c. The merchant's own household personal property.
  d. Printed material.
  e. Wood for fuel.
  f. Ice, seafood, meat, poultry, livestock, eggs, dairy products, bread, cakes, or pies.

(2) A peddler or an itinerant merchant who is an authorized automobile dealer licensed pursuant to Chapter 20 of the General Statutes.

(3) A peddler or an itinerant merchant who is a nonprofit charitable, educational, religious, scientific, or civic organization.

(4) A peddler who maintains a fixed permanent location from which at least ninety percent (90%) of the peddler's sales are made but who sells some goods in the county of the fixed location by peddling.

(5) An itinerant merchant who meets any of the following descriptions:
  a. Locates at a farmer's market.

b. Is part of the State Fair or an agriculture fair that is licensed by the Commissioner of Agriculture pursuant to G.S. 106-520.3.

c. Sells goods at an auction conducted by an auctioneer licensed pursuant to Chapter 85B of the General Statutes.

(6) A peddler who complies with the requirements of G.S. 25A-38 through G.S. 25A-42, or who complies with the requirements of G.S. 14-401.13. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-257. (Effective July 1, 1997) Misdemeanor violations.

(a) Class 1 Misdemeanors. — A person who does any of the following commits a Class 1 misdemeanor:

(1) Fails to keep a record of new merchandise and fails to produce a record or an affidavit pursuant to G.S. 66-254.

(2) Falsifies a record of new merchandise required by G.S. 66-254.

(b) Class 2 Misdemeanors. — A person who does any of the following commits a Class 2 misdemeanor:

(1) If the person is an itinerant merchant or a specialty market vendor, fails to display the retail sales tax license as required by G.S. 66-252.

(2) If the person is a specialty market operator, fails to maintain the daily registration list as required by G.S. 66-255.

(c) Class 3 Misdemeanors. — A person who does any of the following commits a Class 3 misdemeanor:

(1) If the person is a peddler or an itinerant merchant, fails to obtain the permission of the property owner as required by G.S. 66-251.

(2) If the person is a peddler or a specialty market operator, fails to produce the retail sales tax license as required by G.S. 66-252.

(3) Fails to provide name, address, or identification upon request as required by G.S. 66-253 or provides false information in response to the request.

(4) Knowingly gives false information when registering pursuant to G.S. 66-255.

(d) Defense. — Whenever satisfactory evidence is presented in any court of the fact that permission to use property was not displayed as required by G.S. 66-251 or that a retail sales tax license was not displayed or produced as required by G.S. 66-252, the person charged may not be found guilty of that violation if the person produces in court a valid permission or a valid retail sales tax license, respectively, that had been issued prior to the time the person was charged. (1996, 2nd Ex. Sess., c. 14, s. 24.)

## § 66-258. (Effective July 1, 1997) Local regulation not affected.

This Article does not affect the authority of a county or city to impose additional requirements on peddlers, itinerant merchants, specialty market vendors, or specialty market operators by an ordinance adopted under G.S. 153A-125 or G.S. 160A-178. (1996, 2nd Ex. Sess., c. 14, s. 24.)

# Chapter 67.

# Dogs.

## ARTICLE 1A.

## *Dangerous Dogs.*

### § 67-4.1. Definitions and procedures.

CASE NOTES

**Potentially Dangerous Dog.** — The definition of "potentially dangerous dog" as set forth in subdivision (a)(2)c is not unconstitutionally vague and overbroad. Caswell County v. Hanks, 120 N.C. App. 489, 462 S.E.2d 841 (1995).

**Appeal.** — The language of the statute in this case is mandatory, providing that the appeal to superior court shall be heard de novo. Caswell County v. Hanks, 120 N.C. App. 489, 462 S.E.2d 841 (1995).

## ARTICLE 5.

## *Protection of Livestock and Poultry from Ranging Dogs.*

### § 67-30. Appointment of animal control officers authorized; salary, etc.

**Local Modification.** — Rowan: 1985 (Reg. Sess., 1986), c. 872.

By virtue of Session Laws 1995, c. 58, s. 1, Harnett should be stricken from the main volume.

For additional local modifications to this section, see the main pamphlet.

# Chapter 68.

# Fences and Stock Law.

## ARTICLE 3.

## *Livestock Law.*

### § 68-16. Allowing livestock to run at large forbidden.

**Editor's Note.** — Session Laws 1993, c. 539, s. 536, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: 'This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 68-21. Illegally releasing or receiving impounded livestock misdemeanor.

**Editor's Note.** — Session Laws 1993, c. 539, s. 537, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 68-22. Impounded livestock to be fed and watered.

**Editor's Note.** — Session Laws 1993, c. 539, s. 538 which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 68-24. Penalties for violation of this Article.

**Editor's Note.** — Session Laws 1993, c. 539, s. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

### § 68-25. Domestic fowls running at large after notice.

**Editor's Note.** — Session Laws 1993, c. 539, s. 540, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

## ARTICLE 4.

## *Stock along the Outer Banks.*

### § 68-44. Penalty for violation of § 68-42.

**Editor's Note.** — Session Laws 1993, c. 539, s. 541, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# Chapter 69.

# Fire Protection.

**Article 1.**

**Investigation of Fires and Inspection of Premises.**

Sec.
69-1 through 69-7.1. [Recodified.]

**Article 2.**

**Fire Escapes.**

69-8 through 69-13. [Repealed.]

**Article 3.**

**State Volunteer Fire Department.**

69-14 through 69-25. [Recodified.]

**Article 3A.**

**Rural Fire Protection Districts.**

69-25.5. Methods of providing fire protection.

Sec.
69-25.11. Changes in area of district.
69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

**Article 4.**

**Hotels; Safety Provisions.**

69-26 through 69-38. [Recodified.]

**Article 5.**

**Authority and Liability of Firemen.**

69-39, 69-39.1. [Recodified.]

**Article 6.**

**Mutual Aid between Fire Departments.**

69-40. [Recodified.]

## ARTICLE 1.

## *Investigation of Fires and Inspection of Premises.*

**§§ 69-1 through 69-7.1:** Recodified as Article 79 of Chapter 58.

**Editor's Note.** — This Article was recodified as Article 79 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

## ARTICLE 2.

## *Fire Escapes.*

**§§ 69-8 through 69-13:** Repealed by Session Laws 1987, c. 864, s. 51, effective August 14, 1987.

## ARTICLE 3.

## *State Volunteer Fire Department.*

**§§ 69-14 through 69-25:** Recodified as Article 80 of Chapter 58.

**Editor's Note.** — This Article was recodified as Article 80 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

## ARTICLE 3A.

## *Rural Fire Protection Districts.*

### § 69-25.1. Election to be held upon petition of voters.

**Local Modification.** — (As to Article 3A) Alexander: 1993, c. 237, s. 1; Caldwell, Chatham: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Cleveland: 1987 (Reg. Sess., 1988), c. 960; Harnett; 1989 (Reg. Sess., 1990), c. 932; Lee: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Randolph: 1989 (Reg. Sess., 1990), c. 993; Robeson: 1987, c. 560; Wake: 1987 (Reg. Sess., 1988), c. 959; Wayne: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; town of Richfield: 1989 (Reg. Sess., 1990), c. 943, s. 1.

For additional local modifications to this section, see the main pamphlet.

### § 69-25.5. Methods of providing fire protection.

Upon the levy of such tax, the board of county commissioners shall, to the extent of the taxes collected hereunder, provide fire protection for the district —

(1) By contracting with any incorporated city or town, with any incorporated nonprofit volunteer or community fire department, or with the Department of Environment, Health, and Natural Resources to furnish fire protection, or

(2) By furnishing fire protection itself if the county maintains an organized fire department, or

(3) By establishing a fire department within the district, or

(4) By utilizing any two or more of the above listed methods of furnishing fire protection. (1951, c. 820, s. 5; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(11).)

#### CASE NOTES

**Contracting with Incorporated Nonprofit Volunteer Fire Department.** — This section specifically allows county commissioners to contract with an incorporated nonprofit volunteer fire department to provide fire protection. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 85 N.C. App. 598, 355 S.E.2d 139, cert. denied and appeal dismissed, 320 N.C. 632, 360 S.E.2d 88, 89 (1987).

**Liability of Nonprofit Fire Company in a Nonfire Related Rescue Attempt.** — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

## § 69-25.8. Authority, rights, privileges and immunities of counties, etc., performing services under Article.

### CASE NOTES

**Immunity of Fire Departments.** — This section ensures that all fire departments engaged in activities authorized by this chapter receive equivalent statutory and sovereign immunity. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

**Liability of Nonprofit Fire Company in a Nonfire Related Rescue Attempt.** — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

## § 69-25.11. Changes in area of district.

After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:

(1) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory upon the application of the owner, or a two-thirds majority of the owners, of the territory to be included, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners in the county or counties in which said fire protection district is located. However, before said fire protection district change is approved by the county commissioners, notice shall be given once a week for two successive calendar weeks in a newspaper having general circulation in said district, and notice shall be posted at the courthouse door in each county affected, and at three public places in the area to be included, said notices inviting interested citizens to appear at a designated meeting of said county commissioners, said notice to be published the first time and posted not less than fifteen days prior to the date fixed for hearing before the county commissioners.

(2) The area of any fire protection district may be decreased by removing therefrom any territory, upon the application of the owner or owners of the territory to be removed, the unanimous recommendation in writing of the fire protection commissioners of said district, the approval of a majority of the members of the board of directors of the corporation furnishing fire protection to the district, and the approval of the board or boards of county commissioners of the county or counties in which the district is located.

(3) In the case of adjoining fire districts having in effect the same rate of tax for fire protection, the board of county commissioners, upon petition of the fire protection commis-

sioners and the boards of directors of the corporations furnishing fire protection in the districts affected, shall have the authority to relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as to the board may seem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are altered or relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(4) In the case of adjoining fire districts having in effect a different rate of tax for fire protection, the board of county commissioners, upon petition of two thirds of the owners of the territory involved and after receiving a favorable recommendation of the fire protection commissioners and the boards of directors of the corporations furnishing fire protection in the districts affected, may transfer such territory from one district to another and therefore relocate the boundary lines between such fire districts in accordance with the petition or in such other manner as the board may deem proper. Upon receipt of such petition, the board of county commissioners shall set a date and time for a public hearing on the petition, and notice of such hearing shall be published in some newspaper having general circulation within the districts to be affected once a week for two weeks preceding the time of the hearing. Such hearings may be adjourned from time to time and no further notice is required of such adjourned hearings. In the event any boundaries of fire districts are relocated under this section, the same shall take effect at the beginning of the next succeeding fiscal year after such action is taken.

(5) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory lying within the corporate limits of the city if the territory is not already included within a fire protection district, provided both the city governing body and the county commissioners of the county or counties in which the fire protection district is located all agree by resolution to such inclusion. (1955, c. 1270; 1959, c. 805, s. 5; 1965, cc. 625, 1101; 1987, c. 711, s. 2.)

### CASE NOTES

**Exclusive Means of Altering Established Boundaries.** — After a district has been created, the only ways to alter the established boundaries are listed in this section. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 85 N.C. App. 598, 355 S.E.2d 139, cert. denied and appeal dismissed, 320 N.C. 632, 360 S.E.2d 88, 89 (1987).

## § 69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

(a) When the whole or any portion of a fire protection district has been annexed by a municipality furnishing fire protection to its citizens, then such fire protection district or the portion thereof so annexed shall immediately thereupon cease to be a fire protection district or a portion of a fire protection district; and such district or portion thereof so annexed shall no longer be subject to G.S. 69-25.4 authorizing the board of county commissioners to levy and collect a tax in such district for the purpose of furnishing fire protection therein.

(b) Nothing herein shall be deemed to prevent the board of county commissioners from levying and collecting taxes for fire protection in the remaining portion of a fire protection district not annexed by a municipality, as aforesaid.

(c) When all or part of a fire protection district is annexed, and the effective date of the annexation is a date other than a date in the month of June, the amount of the fire protection district tax levied on property in the district for the fiscal year in which municipal taxes are prorated under G.S. 160A-58.10 shall be multiplied by the following fraction: the denominator shall be 12 and the numerator shall be the number of full calendar months remaining in the fiscal year following the day on which the annexation becomes effective. For each owner, the product of the multiplication is the prorated fire protection payment. The finance officer of the city shall obtain from the assessor or tax collector of the county where the annexed territory was located a list of the owners of property on which fire protection district taxes were levied in the territory being annexed, and the city shall, no later than 90 days after the effective date of the annexation, pay the amount of the prorated fire protection district payment to the owners of that property. Such payments shall come from any funds not otherwise restricted by law.

(d) Whenever a city is required to make fire protection district tax payments by subsection (c) of this section, and the city has paid or has contracted to pay to a rural fire department funds under G.S. 160A-37.1 or G.S. 160A-49.1, the county shall pay to the city from funds of the rural fire protection district an amount equal to the amount paid by the city (or to be paid by the city) to a rural fire department under G.S. 160A-37.1 or G.S. 160A-49.1 on account of annexation of territory in the rural fire protection district for the number of months in that fiscal year used in calculating the numerator under subsection (c) of this section; provided that the required payments by the county to the city shall not exceed the total of fire protection district payments made to taxpayers in the district on account of that annexation. (1957, c. 1219; 1985, c. 707, ss. 1, 2; 1987, c. 45, s. 1.)

**Local Modification.** — Town of Richfield: 1989 (Reg. Sess., 1990), c. 943, s. 2.

For additional local modifications to this section, see the main pamphlet.

## § 69-25.17. Validation of fire protection funds appropriated in providing rescue and ambulance services.

### CASE NOTES

**This section and § 58-82-5(c) recognize** that fire departments provide rescue and ambulance services. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

**Liability of Nonprofit Fire Company in Nonfire Related Rescue Attempt.** — A nonprofit fire company employed by the county was liable for plaintiff's injuries in a nonfire related rescue attempt only to the extent of their insurance coverage, since they had governmental immunity up to their insurance coverages and were engaged in duties other than the suppression of a reported fire. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

**Nonprofit Fire Department Entitled to Same Immunity Afforded Other Fire Departments.** — Nonprofit corporation employed by a county as a fire department engaged in statutorily authorized services is entitled to receive the same immunity normally afforded to other fire departments in North Carolina. Geiger v. Guilford College Community Volunteer Firemen's Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987).

## ARTICLE 4.

## *Hotels; Safety Provisions.*

## §§ 69-26 through 69-38: Recodified as Article 81 of Chapter 58.

**Editor's Note.** — This Article was recodified as Article 81 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9, and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Sections 69-26 through 69-31 and 69-35 through 69-37 were repealed by Session Laws 1987, c. 864, s. 52.

## ARTICLE 5.

## *Authority and Liability of Firemen.*

## §§ 69-39, 69-39.1: Recodified as Article 82 of Chapter 58.

**Editor's Note.** — This Article was recodified as Article 82 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9, and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

## ARTICLE 6.

## *Mutual Aid between Fire Departments.*

## § 69-40: Recodified as Article 83 of Chapter 58.

**Editor's Note.** — This Article was recodified as Article 83 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9, and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

# Chapter 70.

# Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

**Article 1.**

**Indian Antiquities.**

Sec.
70-4. Destruction or sale of relic from public lands made misdemeanor.

**Article 3.**

**Unmarked Human Burial and Human Skeletal Remains Protection Act.**

Sec.
70-40. Penalties.

## ARTICLE 1.

## *Indian Antiquities.*

### § 70-4. Destruction or sale of relic from public lands made misdemeanor.

Any person who shall excavate, disturb, remove, destroy or sell any Indian relic or artifact, or any of the contents of any mound or burial ground, on or from any lands owned by the State, by any public agency or institution, by any county, or by any municipal corporation, except with the written approval of the director of the State Museum or the Secretary of the Department of Cultural Resources, shall be guilty of a Class 1 misdemeanor. (1935, c. 198, s. 4; 1973, c. 476, s. 48; 1993, c. 539, s. 542; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Effect of Amendments.** — The 1993 amendment, effective October 1, 1994, and applicable to offenses occurring on or after that date, inserted "Class 1" preceding "misdemeanor".

## ARTICLE 3.

## *Unmarked Human Burial and Human Skeletal Remains Protection Act.*

### § 70-40. Penalties.

(a) Violation of the provisions of G.S. 70-29 is a Class 1 misdemeanor.

(b) Violation of the provisions of G.S. 70-37(a) is a Class H felony. (1981, c. 853, s. 2; 1993, c. 539, s. 543; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 543, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# Chapter 71A.

# Indians.

## § 71A-1. Cherokee Indians of Robeson County; rights and privileges.

**Legal Periodicals.** — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

## § 71A-3. Lumbee Tribe of North Carolina; rights, privileges, immunities, obligations and duties.

**Legal Periodicals.** — For article on criminal jurisdiction on the North Carolina Cherokee Indian reservation, see 24 Wake Forest L. Rev. 335 (1989).

# Chapter 73.

# Mills.

**Article 1.**

**Public Mills.**

Sec.

73-4. Keeping false toll dishes misdemeanor.

## ARTICLE 1.

## *Public Mills.*

### § 73-4. Keeping false toll dishes misdemeanor.

If any owner, by himself or servant, keeping any mill, shall keep any false toll dishes, he shall be guilty of a Class 1 misdemeanor. (1777, c. 122, s. 11; R.C., c. 71, s. 7; Code, s. 1848; Rev., s. 3679; C.S., s. 2534; 1993, c. 539, s. 552; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 552, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# Chapter 74.

# Mines and Quarries.

**Article 7.**

**The Mining Act of 1971.**

Sec.
74-56. Inspection and approval of reclamation; bond release or forfeiture.

## ARTICLE 7.

## *The Mining Act of 1971.*

### § 74-46. Title.

**CASE NOTES**

**Cited** in Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

### § 74-49. Definitions.

**CASE NOTES**

**Removal from Sandpile as Mining.** — Where stockpiles of sand as high as 25 feet tall were placed upon surface soil and 24 years later the sand was covered with new surface soil which grew vegetation, including pine trees, the Department of Environment, Health and Natural Resources was not without substantial justification in its position that the landowner was engaged in mining by removing the sand. Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

### § 74-56. Inspection and approval of reclamation; bond release or forfeiture.

(a) The Department may direct investigations as it may reasonably deem necessary to carry out its duties as prescribed by this Article, and for this purpose may enter at reasonable times upon any mining operation for the purpose of determining compliance with this Article and any rules adopted under this Article and for determining compliance with the terms and conditions of a mining permit, but for no other purpose. No person shall refuse entry or access to any authorized representative of the Department who enters the mining operation for purposes of inspection or other official duties and who presents appropriate credentials; nor shall any person obstruct, hamper, or interfere with the representative while the representative is carrying out official duties. Upon arriving at the site, the representative of the Department shall make every reasonable effort to notify the operator or the operator's agent that the representative of the Department intends to inspect the site. Upon receipt of the operator's annual report or report of completion of reclamation and at any other reasonable time the Department may elect, the Department shall cause the permit area to be inspected to determine whether the operator has complied with the reclamation plan, the requirements of this Article, any rules adopted under this Article, and the terms and conditions of the permit.

(b) The operator shall proceed with reclamation as scheduled in the approved reclamation plan. The Department shall conduct an inspection and give written notice to the operator of any deficiencies noted. The operator shall thereupon commence action within 30 days to rectify these deficiencies and shall diligently proceed until they have been corrected. The Department may extend performance periods referred to in this section and in G.S. 74-53 for delays clearly beyond the operator's control, but only in cases where the Department finds that the operator is making every reasonable effort to comply.

(c) Upon completion of reclamation of an area of affected land, the operator shall notify the Department. The Department shall make an inspection of the area, and if it finds that reclamation has been properly completed, it shall notify the operator in writing and release the operator from further obligations regarding the affected land. At the same time the Department shall release all or the appropriate portion of any performance bond or other security that the operator has posted under G.S. 74-54.

(d) If at any time the Department finds that reclamation of the permit area is not proceeding in accordance with the reclamation plan and that the operator has failed within 30 days after notice to commence corrective action, or if the Department finds that reclamation has not been properly completed in conformance with the reclamation plan within two years, or longer if authorized by the Department, after termination of mining on any segment of the permit area, the Department shall initiate forfeiture proceedings against the bond or other security filed by the operator under G.S. 74-59. In addition, failure to implement the reclamation plan shall constitute grounds for suspension or revocation of the operator's permit, as provided in G.S. 74-58. (1971, c. 545, s. 11; 1987, c. 827, s. 85; 1993 (Reg. Sess., 1994), c. 568, s. 7; 1995, c. 504, s. 3.)

**Effect of Amendments.** — The 1995 amendment, effective July 28, 1995, substituted "may" for "to" preceding "enter at reasonable times" in the first sentence of subsection (a).

## § 74-68. Cooperation with other agencies; contracts and grants.

### CASE NOTES

**Cited** in Crowell Constructors, Inc. v. State, 342 N.C. 838, 467 S.E.2d 675 (1996).

# Chapter 74C.
# Private Protective Services.

**Article 1.**
**Private Protective Services Board.**

Sec.
74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

Sec.
74C-12. Denial, suspension, or revocation of license, registration, or permit.
74C-17. Enforcement.

## ARTICLE 1.
## *Private Protective Services Board.*

### § 74C-2. Licenses required.

CASE NOTES

**Cited** in Cowan v. North Carolina Private Protective Servs. Bd., 98 N.C. App. 498, 391 S.E.2d 217 (1990).

### § 74C-3. Private protective services profession defined.

CASE NOTES

**Newspaper reporter's research activities were investigative,** for the "purpose of obtaining information." Cowan v. North Carolina Private Protective Servs. Bd., 98 N.C. App. 498, 391 S.E.2d 217 (1990), decided prior to the 1989 amendment.

**Consideration of Private Investigative Work.** — While the Private Protective Services Board has the statutory power to grant or deny licenses, it must still act within the scope of its statutory powers. The statutes direct the Board to consider all evidence of experience that is investigative in nature to determine if the applicant had the necessary experience. Therefore, where the Board recognized that petitioner had worked as a runner for a bail bondsman, but refused to consider that work in satisfaction of the investigative experience requirement, the Board erroneously disregarded the mandate of subdivision (a)(8) to consider all private investigative work. Boston v. North Carolina Private Protective Servs. Bd., 96 N.C. App. 204, 385 S.E.2d 148 (1989).

### § 74C-4. Private Protective Services Board established; members; terms; vacancies; compensation; meetings.

(a) The Private Protective Services Board is hereby established in the Department of Justice to administer the licensing and set educational and training requirements for persons, firms, associations, and corporations engaged in a private protective services profession within this State.

(b) The Board shall consist of 10 members: the Attorney General or his designated representative, two persons appointed by the

Attorney General, one person appointed by the Governor, three persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and three persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives. All appointments by the General Assembly shall be subject to the provisions of G.S. 120-121, and vacancies in the positions filled by those appointments shall be filled pursuant to G.S. 120-122. One of those persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and all three persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be licensees under this Chapter; all other appointees may not be licensees of the Board nor licensed by the Board while serving as Board members. All persons appointed shall serve terms of three years. With the exception of the Attorney General or his designated representative, no person shall serve more than eight consecutive years on the Board, including years of service prior and subsequent to July 1, 1983. Board members may continue to serve until their successors have been appointed.

(c) Vacancies on the Board occurring for any reason shall be filled by the authority making the original appointment of the person causing the vacancy.

(d) Each member of the Board, before assuming the duties of his office, shall take an oath for the faithful performance of his duties. A Board member may be removed at the pleasure of the authority making the original appointment or by the Board for misconduct, incompetence, or neglect of duty.

(e) Members of the Board who are State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6. Members of the Board who are full-time salaried public officers or employees other than State officers or employees shall receive no per diem compensation for serving on the Board, but shall be reimbursed for their expenses in accordance with G.S. 138-6 in the same manner as State officers or employees. All other Board members shall receive per diem compensation and reimbursement in accordance with G.S. 93B-5.

(f) The Board shall elect a chairman, vice-chairman, and other officers and committee chairmen from among its members as the Board deems necessary and desirable at the first meeting after July 1 of each year. The chairman and vice-chairman shall be selected by the members of the Board for a term of one year and shall be eligible for reelection. The Board shall meet at the call of the chairman or a majority of the members of the Board at such time, date, and location as may be decided upon by a majority of the Board.

(g) All decisions heretofore made by the Private Protective Services Board, established pursuant to Chapter 74B, shall remain in full force and effect unless and until repealed or suspended by action of the Private Protective Services Board established herein. (1973, c. 528, s. 1; 1975, c. 592, ss. 8, 9; 1977, c. 535; 1979, c. 818, s. 2; 1981, c. 148, s. 1; c. 807, s. 7; 1983, c. 794, s. 7; 1985, c. 597, s. 12; 1989, c. 759, s. 4; 1995, c. 490, s. 39.)

**Editor's Note.** —

Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

**Effect of Amendments.** — The 1995 amendment, in subsection (b), substituted "three persons" for "two persons appointed by the General Assembly upon the recommendation of the President of the Senate, one person" in the first sentence, and in the third sentence added "One of" at the beginning of the sentence, and added "all three persons appointed by the General Assembly upon the recommendation of". For the applicability of this amendment, see Editor's note.

## § 74C-5. Powers of the Board.

### OPINIONS OF ATTORNEY GENERAL

**The Private Protective Services Board has the authority to inspect the records of all licensees** as part of an evaluation conducted pursuant to subdivision (3). See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

## § 74C-8. Applications for an issuance of license.

### CASE NOTES

**Cited** in Boston v. North Carolina Private Protective Servs. Bd., 96 N.C. App. 204, 385 S.E.2d 148 (1989).

## § 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.

### OPINIONS OF ATTORNEY GENERAL

**Permit Fees.** — The Private Protective Services Board has the authority pursuant to subdivision (e)(8) to charge private investigators a full fee for an armed security guard firearm registration permit. See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

## § 74C-12. Denial, suspension, or revocation of license, registration, or permit.

(a) The Board may, after compliance with Chapter 150B of the General Statutes, deny, suspend or revoke a license, registration, or permit issued under this Chapter if it is determined that the applicant, licensee, registrant, or permit holder has:

(1) Made any false statement or given any false information in connection with any application for a license, registration, or permit or for the renewal or reinstatement of a license, registration, or permit;

(2) Violated any provision of this Chapter;

(3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;

(4) Repealed by Session Laws 1989, c. 759, s. 10, effective October 1, 1989;

(5) Impersonated or permitted or aided and abetted any other person to impersonate a law enforcement officer of the

United States, this State, any other state, or any political subdivision of a state;

(6) Engaged in or permitted any employee to engage in a private protective services profession when not lawfully in possession of a valid license issued under the provisions of this Chapter;

(7) Willfully failed or refused to render to a client service as agreed between the parties and for which compensation has been paid or tendered in accordance with the agreement of the parties;

(8) Knowingly made any false report to the employer or client for whom information is being obtained;

(9) Committed an unlawful breaking or entering, assault, battery, or kidnapping;

(10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee;

(11) Repealed by Session Laws 1989, c. 759, s. 10, effective October 1, 1989;

(12) Undertaken to give legal advice or counsel or to in any way falsely represent that he is representing any attorney or he is appearing or will appear as an attorney in any legal proceeding;

(13) Issued, delivered, or uttered any simulation of process of any nature which might lead a person or persons to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding;

(14) Failed to make the required contribution to the Private Protective Services Recovery Fund or failed to maintain the certificate of liability insurance required by this Chapter;

(15) Violated the firearm provisions set forth in this Chapter;

(16) Repealed by Session Laws 1989, c. 759, s. 10, effective October 1, 1989;

(17) Failed to notify the Administrator by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business entity's qualifying agent within the time set forth in this Chapter;

(18) Failed to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent;

(19) Been judged incompetent by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or committed to a mental health facility for treatment of mental illness, as defined in G.S. 122C-3, by a court under G.S. 122C-271;

(20) Failed or refused to offer a report to a client within 30 days of the client's written request;

(21) Been previously denied a license, registration, or permit under this Chapter or previously had a license, registration, or permit revoked for cause;

(22) Engaged in a private protective services profession under a name other than the name under which the license was obtained under the provisions of this Chapter;

(23) Divulged to any person, except as required by law, any information acquired by him except at the direction of the

employer or client for whom the information was obtained. A licensee may divulge to any law enforcement officer or district attorney or his representative any information the law enforcement officer may require to investigate a criminal offense with the prior approval and consent of the client;

(24) Fraudulently held himself out as employed by or licensed by the State Bureau of Investigation or any other governmental authority;

(25) Intemperate habits or lacks good moral character. The acts that are prima facie evidence of intemperate habits or lack of good moral character under G.S. 74C-8(d)(2) are prima facie evidence of the same under this subdivision;

(26) Advertised or solicited business using a name other than that in which the license was issued;

(27) Worn, carried, or accepted any badge or shield purporting to indicate that the person is a private detective or private investigator while licensed under the provisions of this Chapter as a private investigator.

(b) The denial, revocation, or suspension of a license, registration, or permit by the Board shall be in writing, be signed by the Administrator of the Board, and state the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from this decision as provided in Chapter 150B of the General Statutes.

(c) The following persons may not be issued a license, registration, or permit under this Chapter:

(1) A sworn court official.

(2) A holder of a company police commission under Chapter 74E of the General Statutes. (1979, c. 818, s. 2; 1981, c. 807, s. 6; 1987, c. 550, s. 20; c. 657, s. 6; 1989, c. 759, s. 10; 1991 (Reg. Sess., 1992), c. 1043, s. 5.)

## § 74C-13. Armed security guard required to have firearm registration permit; security guard training.

### OPINIONS OF ATTORNEY GENERAL

**The definition of an armed security guard** as set forth in subdivision (a)(1) includes a private investigator who carries a weapon. See opinion of Attorney General to James F. Kirk, Administrator, N.C. Private Protective Services Board, 60 N.C.A.G. 12 (1990).

## § 74C-17. Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the superior court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) Any person, firm, association, or corporation or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) In lieu of revocation or suspension of a license or permit under G.S. 74C-12, a civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person or business who violates any provision of this Chapter or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation.

(d) Proceedings for the assessment of civil penalties under this section shall be governed by Chapter 150B of the General Statutes. If the person assessed a civil penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law. (1979, c. 818, s. 2; 1983, c. 794, s. 6; 1989, c. 759, s. 14; 1993, c. 539, s. 557; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 557, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

**Legal Periodicals.** — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'", see 68 N.C.L. Rev. 1035 (1990).

## § 74C-21. Law enforcement officer provisions.

### CASE NOTES

**Cited** in State v. Gaines, 332 N.C. 461, 421 S.E.2d 569 (1992).

## ARTICLE 2.

## *Private Protective Services Recovery Fund.*

## § 74C-31. Application for payment out of Fund; hearing grounds.

**Editor's Note.** — The historical citation in parentheses at the end of this section in the main volume should read: "(1983, c. 673, s. 2; 1987, c. 827, s. 1; 1989, c. 759, s. 17)."

# Chapter 74D.
# Alarm Systems.

Article 1.
Alarm Systems Licensing Act.

Sec.
74D-4. Alarm Systems Licensing Board.
74D-11. Enforcement.

## ARTICLE 1.

## *Alarm Systems Licensing Act.*

### § 74D-4. Alarm Systems Licensing Board.

(a) The Alarm Systems Licensing Board is hereby established.

(b) The Board shall consist of seven members: the Attorney General or his designee; two persons appointed by the Governor, one of whom shall be licensed under this Chapter and one of whom shall be a public member; two persons appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, one of whom shall be licensed under this Chapter and one of whom shall be a public member; and two persons appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, one of whom shall be licensed under this Chapter and one of whom shall be a public member.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is installed. No member shall serve more than two complete three-year consecutive terms. The term of each member, other than the Attorney General or his designee, who is serving on August 7, 1989, shall terminate on June 30, 1989. Of the appointments made by the General Assembly upon the recommendation of the President of the Senate to begin on July 1, 1989, one member shall be for a term of one year and one member shall be for a term of three years. Of the appointments made by the General Assembly upon the recommendation of the Speaker of the House of Representatives, one member shall be appointed for a term of two years and one member shall be appointed for a term of three years. Thereafter all terms shall be for three years.

(d) A vacancy on the Board shall be filled for the unexpired term by the original appointing authority. Vacancies in legislative appointments shall be filled under G.S. 120-122. A vacancy may be created by removal of a Board member, either at the pleasure of the original appointing authority or by the remaining members of the Board for misconduct, incompetence or neglect of duty. A Board member may only be removed by remaining board members pursuant to a hearing at which the member subject to removal has an opportunity to be heard.

(e) Board members who are also State officers or employees shall receive no per diem compensation for serving on the Board, and shall only receive the travel allowances set forth in G.S. 138-6. All other Board members shall receive reimbursement in accordance with G.S. 93B-5(b) and, notwithstanding G.S. 93B-5(a), shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the Board. The Board shall set the per diem compensation of Board members who are not also State officers or employees.

(f) The Board shall elect a chairman and a vice-chairman from its membership by majority vote at the first meeting of its fiscal year. The vice-chairman shall serve as chairman of the screening committee and shall also serve as chairman in the chairman's absence. At no time shall both the positions of chairman and vice-chairman be held by either an industry representative or a nonindustry representative.

(g) The Board shall meet at the call of the chairman or a majority of the members of the Board. The Board shall adopt rules governing the call and conduct of its meetings. A majority of the current Board membership constitutes a quorum. (1983, c. 786, s. 1; 1985, c. 561, s. 4; 1985 (Reg. Sess., 1986), c. 1026, s. 18; 1989, c. 730, s. 3; 1991 (Reg. Sess., 1992), c. 953, s. 3; 1995, c. 490, s. 6.)

**Editor's Note.** — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

**Effect of Amendments.** — The 1995 amendment added "Pro Tempore" in subsection (b). For the applicability of this amendment, see Editor's note.

## § 74D-11. Enforcement.

(a) The Board is authorized to apply in its own name to any judge of the Superior Court of the General Court of Justice for an injunction in order to prevent any violation or threatened violation of the provisions of this Chapter.

(b) Any person, firm, association, corporation, or department or division of a firm, association or corporation, or their agents and employees violating any of the provisions of this Chapter or knowingly violating any rule promulgated to implement this Chapter shall be guilty of a Class 1 misdemeanor. The Attorney General, or his representative, shall have concurrent jurisdiction with the district attorneys of this State to prosecute violations of this Chapter.

(c) The regulation of alarm systems businesses shall be exclusive to the Board; however, any city or county shall be permitted to require an alarm systems business operating within its jurisdiction to register and to supply information regarding its license, and may adopt an ordinance to require users of alarm systems to obtain revocable permits when alarm usage involves automatic signal transmission to a law-enforcement agency.

(d) In lieu of revocation of suspension of a license or registration under G.S. 74D-10, a civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person who violates any provision of this Chapter, or any rule of the Board adopted pursuant to this Chapter. In determining the amount of any penalty, the Board shall consider the degree and extent of harm caused by the violation. All penalties collected under this section will be deposited in the General Fund.

(e) Proceedings for the assessment of civil penalties shall be governed by Chapter 150B of the General Statutes. If the person assessed a penalty fails to pay the penalty to the Board, the Board may institute an action in the superior court of the county in which the person resides or has his principal place of business to recover the unpaid amount of the penalty. An action to recover a civil penalty under this section shall not relieve any party from any other penalty prescribed by law. (1983, c. 786, s. 1; 1989, c. 730, s. 8; 1991 (Reg. Sess., 1992), c. 953, s. 10; 1993, c. 539, s. 558; 1994, Ex. Sess., c. 24, s. 14(c).)

**Editor's Note.** — Session Laws 1993, c. 539, s. 558, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

# Chapter 74E.

# Company Police Act.

Sec.
74E-13. Penalties and enforcement.

## § 74E-1. Title.

### CASE NOTES

**Constitutionality.** — Former Chapter 74A was unconstitutional as applied to the delegation of police powers to Campbell University. State v. Pendleton, 339 N.C. 379, 451 S.E.2d 274 (1994), cert. denied, — U.S. —, 115 S. Ct. 2276, 132 L. Ed. 2d 280 (1995).

## § 74E-13. Penalties and enforcement.

(a) No private person, firm, association, or corporation, and no public institution, agency, or other entity shall engage in, perform any services as, or in any way hold itself out as a company police agency or engage in the recruitment or hiring of company police officers without having first complied with the provisions of this Chapter. Any person, firm, association, or corporation, or their agents and employees violating any of the provisions of this Chapter shall be guilty of a Class 1 misdemeanor.

(b) The Company Police Program may apply in its own name to the superior court for an injunction to prevent any violation or threatened violation of this Chapter or a rule adopted under this Chapter, and the superior courts have jurisdiction to grant the requested relief, irrespective of whether or not criminal prosecution has been instituted or administrative sanctions imposed because of the violation. The venue for an action brought under this subsection shall be in any county selected by the Attorney General.

(c) This section does not relieve a company police agency from any civil liability for the acts of its company police officers in exercising or attempting to exercise the powers conferred by this Chapter. (1991 (Reg. Sess., 1992), c. 1043, s. 1; 1993 (Reg. Sess., 1994), c. 767, s. 26.)

**Editor's Note.** — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

*November 1, 1996*

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1996 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

*Attorney General of North Carolina*

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## STATE OF NORTH CAROLINA

## *Department of Justice*

Raleigh, North Carolina

November 1, 1996

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Michael F. Easley

*Attorney General of North Carolina*